

No. 15871

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United States  
Court of Appeals  
for the Ninth Circuit

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CLARENCE A. KOLSTAD and ALTA A.  
KOLSTAD,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

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Transcript of Record  
In Two Volumes

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Volume II  
(Pages 271 to 553)

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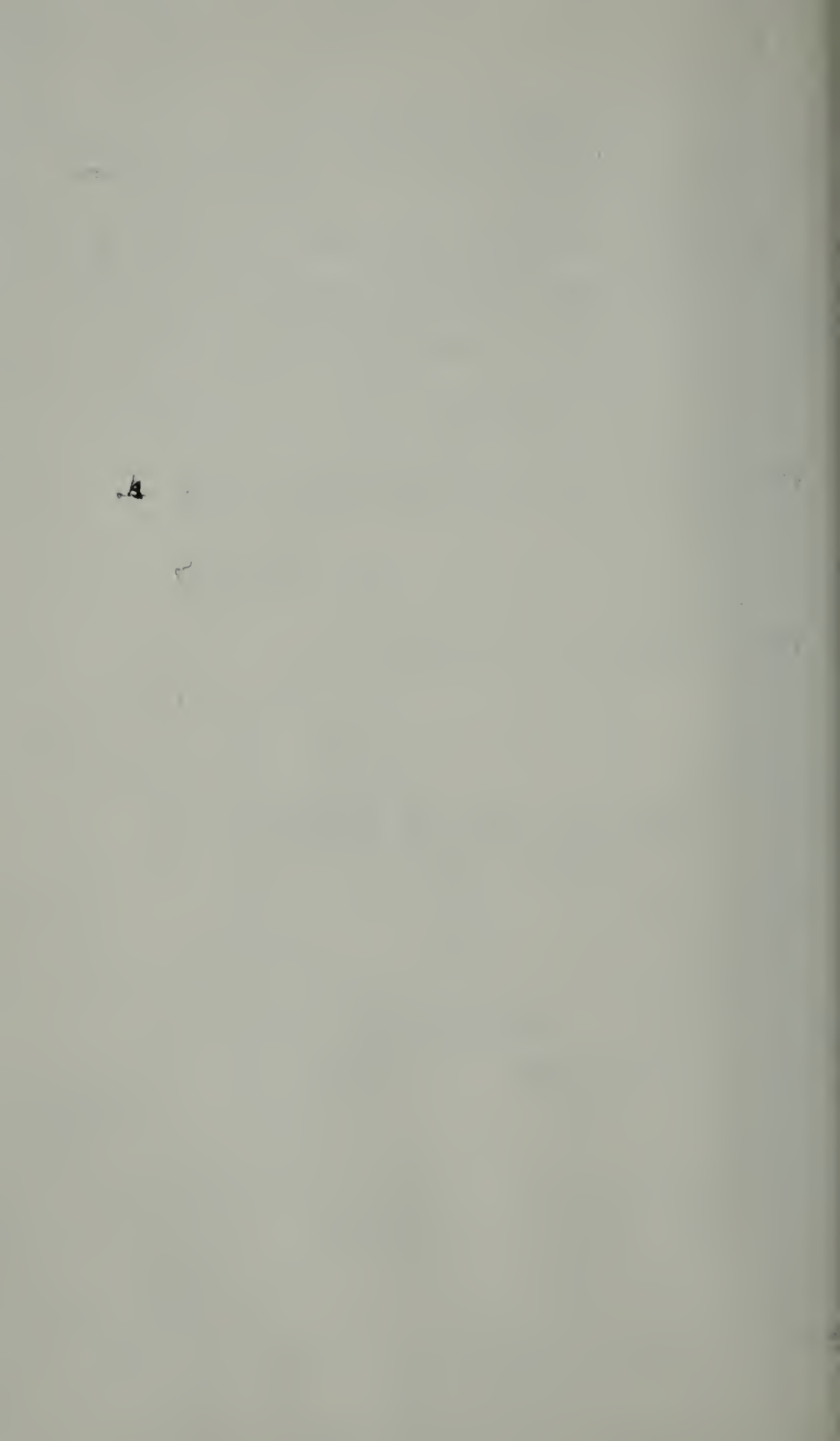
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(Testimony of Clarence A. Kolstad.)

Q. And you have marked 14 there to identify it?

A. And facing south, yes.

Q. Marking that on Exhibit No. 10. Let's identify the direction in which the picture was taken.

A. South, facing south.

Q. And what does that represent or depict?

A. Clear river bottoms, those that don't have brush and trees.

Q. It is looking over the river bottom of the Marias River, is it?      A. Yes.

Q. Take the next one, 15, can you mark the point from which it was taken by a 15 on Exhibit 10?

A. It was taken facing west over into a dense river bottom covered with a lot of brush and trees, a wintering spot.

Q. Would you call this a typical river bottom with brush [238] and trees that you spoke of as being valuable for the wintering of stock?

A. No, I would say it was exceptional, the envy of all the stockmen around; one of the best in the Marias River.

Q. It is part of your joint property?

A. It is so good I never cleared it to plant alfalfa on it.

Q. Now, mark 16, please.

(Witness does as requested.)

Q. And you have now marked the point from which exhibit No. 16 was taken on Exhibit No. 10, have you?      A. Yes.

Q. What is that?

(Testimony of Clarence A. Kolstad.)

A. It is an alfalfa field.

Q. On the river bottom, is it? A. Yes.

Mr. Galles: Facing which direction, still west? It is facing west? I mean you faced west taking the picture?

Q. It looks to the west? A. Yes.

Q. Now, you have marked a dot and No. 17 by the dot on Exhibit 10 to show the point from which Exhibit No. 17 was taken, have you? A. Yes.

Q. In which direction was the camera [239] facing? A. East or northeast.

Q. What does it show?

A. Part of an alfalfa field and more of the river bottom.

Q. In other words, it is all river bottom depicted here, is it?

A. Yes, river bottom clear up to the ridge.

Q. And the next one?

A. Eighteen is taken in the same place, only switched over farther to get the rest of the meadow.

Q. Looking in which direction?

A. North and a little east.

Q. Does it show the Marias River?

A. Right there.

Q. It shows the breaks on the other side of the river and shelter for cattle, does it? A. Yes.

Q. And likewise shows the bottoms in between, does it?

A. Yes. That one was taken facing south.

Q. Now, you have marked upon Exhibit No. 10 another dot numbered 19 on the exhibit which repre-

(Testimony of Clarence A. Kolstad.)

sents the place from which Exhibit 19 was taken, does it?      A. Yes.

Q. It was facing south, you say?      A. Yes.

Q. What does it show? [240]

A. Alfalfa meadow.

Q. In other words, this light-colored ground below the breaks on here on the other side is alfalfa, is it?      A. Yes.

Q. What we see in the foreground here is river bottom, is it?

A. It is just a break from one bench up to the next one.

Q. Where does the river lay here, behind us?

A. No, over along the edge.

Q. Had there been any flooding at the time the picture was taken?

A. No, it was taken in the spring of 1956.

Q. Now, could you tell us—I think—when were these exhibits taken?

A. I think all you have there were taken in the spring of 1956.

Q. What I have here is Exhibits 14 to 19, inclusive?      A. Yes.

Q. You think they were all taken in the spring?

A. Yes, I am sure.

Q. You might take a look to be sure you haven't made an error in that.

A. No, because they are all in the bottom. That would be under water in the fall when I took the other pictures. They were all taken in the [241] spring.

(Testimony of Clarence A. Kolstad.)

Mr. Wiggenhorn: That is all I have, your Honor.

The Court: Do you offer them now?

Mr. Wiggenhorn: Yes.

The Court: Any objection?

Mr. Galles: If I may look at them. No objection.

The Court: Very well, they are admitted.

(Defendants' Exhibits 14 to 19, inclusive, being the pictures above referred to, were here received in evidence.)

The Court: Court will stand in recess until ten o'clock tomorrow morning. (Jury admonished.)

(Thereupon, a recess was taken until 10 o'clock a.m., the following morning, January 18, 1957, at which time the following proceedings were had:)

Mr. Wiggenhorn: These pictures that were introduced last night weren't handed to the jury. I wonder if we might pass them to the jury?

The Court: Yes.

Mr. Galles: May we proceed.

The Court: Yes.

#### Further Cross-Examination

By Mr. Galles:

Q. Mr. Kolstad, you were going to give us a summary of the allotted acres on the three different tracts of land owned either by you or Mrs. Kolstad or you and Mrs. Kolstad [242] jointly. Have you those figures with you now? A. Yes.

(Testimony of Clarence A. Kolstad.)

Q. All right, with reference to the land owned by yourself, what is the allotment acreage?

A. We are talking about before taking?

Q. Before the taking and as of May, 1955.

A. Before the taking, there were 658 allotted acres out of the total. I am talking about allotment acres here. We will get all confused because it won't match those you have on the papers. It never does.

The Court: Mr. Kolstad, don't worry about what he has, just answer the questions.

A. Well, out of the total of 2,508.6 in the farm, the allotted acres are 658 acres.

Q. Very well. Now, on the tract owned by Mrs. Kolstad, and would you give the total farm and then the total acres and the allotted acres?

A. The total farm, by that do you mean the total holding?

Q. The total plowed that belonged to Alta Kolstad before the taking. I think you testified it was 1,666.59 acres.

A. 1,631.1 in the allotment measurements, and the allotted acres were 401. The reason for the discrepancy in acres is because the allotment office measures different. We will call 160 acres of plowed ground 160 acres. When they take 160 acres of ground, on every half mile there is a road and [243] they deduct it, so that is where they get fractions and lesser acreage as per government survey.

Q. That is why you gave the total as 2,508 acres in connection with the allotment when you testified



(Testimony of Clarence A. Kolstad.)

yesterday that in your land there was 2,551, a difference of 43 acres?

A. That is correct, that is what we lost in the allotment office, but when selling land with 320 acres of plowed land, it is 320 acres.

Q. I understand. Now, on the Clarence and Alta lands held jointly, yesterday you said before taking there was 1,560 plowed acres. Now, how many?

A. In the allotment figures, there are 1,572. I don't know how they got a larger figure, and the allotted acreage is 412 acres.

Q. Now, yesterday you testified that the average production was 22 bushels from the planted acres?

A. Right around that.

Q. Over how many years is that?

A. About seven years I had records of.

Q. Would that include 1956?

A. I think it did, I believe it did.

Q. So the jury doesn't get the wrong impression, you were farming that under a permit or right of the government to farm that land?

A. I had a lease from the State Fish and Game Commission. [244]

Q. Yes. What was your production per acre in 1949, do you remember that?

A. No, I don't.

Q. That was during the period you had it leased to the Mizner Brothers?

A. Yes.

Q. Isn't it true that it was 12 bushels to the acre on that year as reported to you by them?

A. No, I don't think so. I would have to look at

(Testimony of Clarence A. Kolstad.)

my records. I could look and tell you exactly what I received.

Q. All right, if you have it. Also, I would like to have you get the '52, the '52 production.

A. No, I am sorry about that 1949, because I couldn't get the seeded acres out of the allotment office. They destroyed the records. 1948 and 1949, I don't have a complete record.

Q. You don't have that information?

A. No, I started with 1950. That is the last seeded acre record available in the allotment office.

Q. What was the production in 1950?

A. Nineteen bushels.

Q. Now, that is according to the allotted acres?

A. According to the allotted acres and elevator receipts.

Q. And it was during that time that the Mizner Brothers had it leased and actually operated the farm?

A. Yes. [245]

Q. You don't know whether their production was confined to the allotted acres or whether they had additional acreage planted?

A. There was no allotted acres then.

Q. Oh, I see. All right, now, 1952, what does your production record show?

A. 21.2.

Q. That is bushels per acre?

A. That's right.

Q. And that is off the three places involved in this action?

A. Yes.

Q. That doesn't include the place operated by your sons or any other place?

A. No.

(Testimony of Clarence A. Kolstad.)

Q. All right, thank you.

A. It also doesn't include the seed that was deducted for use. I took these records here strictly from what went over the elevator scales. The stuff that was held back and used for seed was adjusted at the end of the year and paid for, so it would swell it to 22 or so for the year we are talking about.

Q. Did you sell any wheat at the elevator that was produced in a previous year?

The Court: Take the stand, sit up there. [246]

Q. Did you understand my last question?

A. No, better repeat it.

Q. I will ask it again. From your records and the elevator receipts, was any of that wheat that you sold produced in a previous year from the year sold?

A. There might have been a thousand or two thousand bushels hang over, but they were selling their wheat every year as they harvested it. There wouldn't be any appreciable amount. They always keep back a couple or three bins for seed and what was left over from seed was sold the next year.

Q. When you say there wouldn't be any appreciable difference, can you give it in percentage, an estimate?

A. Probably about two or three per cent, not any more, but that is true from year to year. We was always holding over, so it ought to equalize out.

Q. You say the Mizner brothers had this leased for five years?           A. Yes.

Q. And they started in 1947?           A. Yes.



(Testimony of Clarence A. Kolstad.)

Q. And when did they get off the place?

A. In 1952, but they cropped—wait a minute, now. Yes, they cropped in 1953, see, they had their summer fallow in 1952, so they seeded and cropped that in 1953.

Q. Did they harvest the crop in 1953, or [247] you?      A. They did.

Q. So they went on there and summer fallowed in 1947?

A. No, in 1948, they took it in the fall of 1947.

Q. Then their first year's work was in 1948?

A. That's right.

Q. Did they take crop off any part of it in 1948?

A. Yes.

Q. Then in 1948, they had a crop on part of it?

A. Yes.

Q. And in '50, they had a crop on part?

A. Yes.

Q. And in '51, they had a crop on part?

A. Yes.

Q. And in '52 and '53?      A. Yes.

Q. So they took six crops off?

A. That is what it amounts to, and five years of summer fallow.

Q. Yesterday, you stated as one of the bases for arriving at your opinion were some sales at \$135 per acre, and that one was a state sale. Was that the 160 acres of tillable land, that is, not plowed, that was purchased by Kolstad?

A. That was one of them.

Q. And there was another piece of state land

(Testimony of Clarence A. Kolstad.)

sold that same day, 320 acres of tillable land, the same kind of land, at [248] \$50 an acre with the same bidders present, wasn't there?

A. I think so, I wasn't at the sale.

Q. And the other \$135 sale you mentioned you took into consideration, a Kolstad was involved in that sale also?

A. No. When I said \$150 for a piece of tillable land, I was referring to the one in Hill County.

Q. No, I am talking about the \$135 an acre sale you referred to, wasn't that from Kelly Kolstad to Mrs. Ray?

A. You are talking about a farm now?

Q. Yes. A. Yes, I had that in mind.

Q. And both of the Kolstads involved in those two sales you considered are related to you in some way?

A. One of them is a cousin and the other is a brother.

Q. I see. A. Or a nephew, I should say.

Q. This artesian well that you mentioned, that pressure you referred to is a shut in pressure, that is not the flowing pressure, is it?

A. It shows that much pressure on a guage.

Q. When it is shut off? A. Yes.

Q. And when it is fully opened, there is about 27 pounds?

A. I never heard that figure before.

Q. You don't know that, but anyway, when the well is shut [249] off, it registers, what figure did you say, how many pounds?

(Testimony of Clarence A. Kolstad.)

A. 135, that is what the drillers told me at the well. I don't know only what they told me. They knew what they were doing, I imagine.

Q. I want to refer you to Exhibit No. 3, being a photograph, and as I understand it, this is looking north?

A. Yes, it is.

Q. Is there any part of the land of Clarence Knutson shown in this picture?

A. That little chunk of summer fallow right there (indicating).

Q. But all the stubble is yours?

A. That summer fallow is mine, but the stubble the other side is his.

Q. Between what is shown as summer fallow on the left side of the picture and the breaks in the background is the Clarence Knutson tract of 320 acres?

A. Yes, away up at the other end.

Mr. Galles: That is all.

### Redirect Examination

By Mr. Wiggenhorn:

Q. On cross-examination counsel pointed out to you that in looking at the maps here, each of these respective three places, I have forgotten which one they then referred to you, [250] but they indicated to you on this map that some of this tillable ground you had classed as tillable was just in small patches and in fingers, I think the expression used was. When you considered that and gave your opinion of the value of the tillable ground on any one of the three places you have testified to, did you take into

(Testimony of Clarence A. Kolstad.)

consideration the fact that it was in some cases small patches?      A. Why certainly.

Q. And in making the value, why it would somewhat depend upon the size of the field that is classified by you as tillable as to whether its value is higher or lower?      A. Yes.

Q. You were asked yesterday about whether you had any water right out of the Marias River, and I believe you stated you did not have a water right out of the Marias River. Do you know whether or not the rights in the Marias River, the right to the use of water in that river has ever been adjudicated?      A. I don't know.

Q. Do you understand, Mr. Kolstad, that in the case of the use of water out of a stream——

Mr. Galles: May I make an objection?

The Court: Wait until he finishes the question.

Mr. Wiggenhorn: It is all right with me if counsel wants to anticipate me.

The Court: Go ahead and ask the question. [251]

Q. Do you understand in the use of water out of a stream by the landowners who can divert water from that stream to their lands, unless the rights have been adjudicated by a court, and by that I mean unless the court has decided the priority in which the water may be used as to time, that with respect to anyone to whom that water is available for irrigation purposes, the matter of right is just a matter of relativity, that is to say, whether first, second, third or fourth, as the case may be.

Mr. Galles: Object to the question, your Honor,

(Testimony of Clarence A. Kolstad.)

as no foundation has been laid that this witness is qualified in legal matters. It is immaterial. I further move the question be stricken and the jury admonished to disregard the implications in the question.

The Court: The objection is sustained, but not because it is immaterial. You have raised the question, but that is a matter of law, that is a matter of law upon which the Court will instruct the jury upon proper request.

Q. I take it, Mr. Kolstad, you don't know anything about the law of water appropriation?

A. No, nothing at all.

Q. Do you know what you said when you said you didn't have a water right?

A. What I thought he meant, you can file an instrument declaring your right in a stream. I didn't have any filed. [252]

Q. Is that what you meant, you didn't have any filed?

A. Isn't there such a thing as an instrument you file to declare your water rights?

The Court: Counsel, I think the matter is perfectly clear. Government counsel raised the question as to whether or not he had any rights. The Court will give a proper instruction if you submit it to the Court with reference to what the law is.

Mr. Wiggenhorn: No further questions.

Mr. Galles: That is all.

(Witness excused.)



## RICHARD ALLEN RAY

called as a witness on behalf of defendants, being first duly sworn, testified as follows:

## Direct Examination

By Mr. Schiltz:

Q. Will you state your name, please?

A. Richard Allen Ray.

Q. Where do you live?

A. Chester, Montana.

Q. What is your occupation? A. Farming.

Q. Where is your farm?

A. Southwest of Chester about 18 miles. [253]

Q. How long have you farmed in the Chester area?

A. Oh, I have been actually farming probably about nine years.

Q. Have you been in charge of a farm and operated a farm yourself during that time?

A. Yes, I have been kind of in charge. I farmed it for mother.

Q. Are you acquainted with the lands involved in this case, that is, the lands belonging to Mr. Clarence Kolstad and lands belonging to Alta Kolstad, and to their joint lands?

A. Yes, I have been over those lands.

Q. Can you tell us on a map of Liberty County where—strike that question. Were you and your mother parties to a sale of certain lands in Liberty County to Mr. Kamerzel? A. Yes.

Q. When did that sale take place?

A. April, 1955.

(Testimony of Richard Allen Ray.)

Q. How many acres of land were involved in that sale?  
A. 940 acres.

Q. How many of those 940 acres were cultivated?

A. All but three or four, something like that.

Q. Will you show us generally on Defendant's Exhibit No. 2 where the lands that you sold to Mr. Kamerzel are located? Will you mark generally on that map with red pencil where those lands are located? [254]

A. This is a mile here (indicating)?

Q. Yes.

A. Well, it would be right in about here (indicating). Do you want me to draw a circle?

Q. Yes, and then off to the side, can you write "Ray to Kamerzel"?

(Witness does as requested.)

Q. Now, then, looking at the map, I notice you have drawn a circle southwest of Chester?

A. Yes.

Q. About two miles or such a matter?

A. Well, it would be about three or four miles southwest of Chester.

Q. And also, comparing these lands to the Kolstad properties, it would be how far away from the Kolstad property?

A. I suppose it must be around 12 or 13 miles northeast.

Q. Where are those lands located with reference to the Marias River?

(Testimony of Richard Allen Ray.)

A. Well, they would be about 17 miles north of the Marias River.

Q. Where with reference to the Great Northern Railroad? A. Two miles south.

Q. Are you familiar with Cottonwood Creek?

A. Yes.

Q. Where are they located with reference to Cottonwood Creek? [255]

A. About two miles west of Cottonwood Creek.

Q. Do I understand that this particular land that you sold to Mr. Kamerzel had been your farm at one time, I mean you had farmed it, it wasn't a piece you had just owned for a matter of a year or two? A. No, it had been farmed quite awhile.

Q. How long had you farmed it?

A. I bought it in 1947.

Q. You farmed it continuously from 1947 to 1955 when you sold it? A. That's right.

Q. What did you raise on the farm?

A. Wheat.

Q. Spring wheat or winter wheat?

A. Spring wheat.

Q. What was the average yield on that farm while you had it? A. About 13 bushels.

Q. Any improvements involved in the transaction?

A. One granary, that was all there was.

Q. Approximately what was the granary worth?

A. About \$2,000, I suppose.

Q. Was there a crop on the property when you sold it?



(Testimony of Richard Allen Ray.)

A. There was some crop on the summer fallow, yes.

Q. What was the purchase price for the sale of that property? [256] A. \$100,000.

Q. \$100,000 for 940 acres. If my arithmetic is correct, that figures about \$106 per acre across the board? A. That's right.

Q. If you know, how do the lands involved in that Kamerzel sale compare with the Kolstad lands to the southwest?

A. Well, it is not in the winter wheat belt, it very seldom raises winter wheat up in that area. Why, I am not sure, but winter wheat doesn't pan out.

Q. In your opinion, is land which will produce winter wheat more valuable than land that produces spring wheat? A. Yes.

Q. It is a more stable crop?

A. Yes, it always out yields spring wheat if you can raise it.

Q. How many acres of that 940 acres were allotted to wheat? A. 320 acres.

Q. Roughly one-third was allotted to wheat?

A. That's right.

Q. Now, directing your attention to that unit, 940 acres, was that, in your opinion, an economic unit?

A. No, not by itself. That is the reason we sold it. It wasn't large enough.

Q. Were you and your mother likewise parties to a purchase and sale of lands in Liberty County from Clarence J. Kolstad, [257] or Kelly Kolstad,

(Testimony of Richard Allen Ray.)

as he is commonly called?           A. Yes.

Q. When did that sale take place?

A. October, 1955.

Q. Now, then, what were the details of that sale, were you purchasers or sellers of that property?

A. We were purchasers.

Q. What were the details of that sale, how did it come about?

A. Well, evidently, Mr. Kolstad, Kelly Kolstad, had contacted a real estate agent and put his place up for sale, and this real estate agent thought we might be interested, and being it was fairly close and he knew we sold our place and wanted to buy some land, a larger place, and he come and contacted us, so when we came to deal——

Q. You closed the deal for the property?

A. That's right.

Q. As I understand, the property sold under contract for deed, or you bought it under a contract for deed?           A. Yes.

Q. You made a down payment?           A. Yes.

Q. And the papers were escrowed in the bank?

A. Yes, the deed was escrowed and a contract was all put in the bank. [258]

Q. How many acres of land were contained in that property?

Mr. Galles: I will object to that as not being the best evidence since a contract was entered into between these parties. He has a contract.

Mr. Schiltz: He has the contract. Do you want it introduced?

(Testimony of Richard Allen Ray.)

Mr. Galles: I would like to see it, if I may.

(Instrument produced and furnished to Mr. Galles.)

Mr. Galles: I think rather than taking the time to study this, if it is all right, may we put it in evidence?

Mr. Schiltz: I have no objection to putting it in evidence. He can testify to all the terms of it.

Mr. Galles: It would be quicker if he would just put it in evidence. I wouldn't have to take the time now.

Mr. Wiggenhorn: I presume, your Honor, that should the owner of this contract require its possession for some reason arrangements could afterwards be made to substitute a copy?

The Court: Oh, yes.

Q. Now, I hand you what has been identified as Defendants' Exhibit No. 20. If you are familiar with that document, will you tell what it is?

A. This is a contract for deed for this sale from Kelly Kolstad to us of a parcel of land.

Q. That contract bears what date?

A. This has the 14th day of October. [259]

Q. Of what year? A. 1955.

Q. And has it been—does it contain your signature and the signature of your mother as buyers of that property? A. Yes.

Q. And does it contain the signature of Mr. Clarence J. Kolstad or Kelly Kolstad?

A. Clarence J. and Anna M. Kolstad, his wife.

(Testimony of Richard Allen Ray.)

Q. This Clarence J. Kolstad, one of the parties to this transaction, is not Clarence A. Kolstad who is a party to this case? A. No.

Q. He is a cousin or nephew or something else?

A. Cousin, I guess.

Q. Now, then, how many acres of land were contained in that sale? A. 1,880 acres.

Q. Directing your attention again to Defendants' Exhibit No. 2, will you mark on that exhibit the general location of these 1,880 acres?

Mr. Galles: I wonder if I might examine the witness first on the contract in order to determine whether this sale is admissible as a comparable sale, voir dire?

Mr. Schiltz: We will bring that out before we are through, I think. [260]

The Court: He hasn't finished qualifying him yet.

Mr. Galles: I will object to any further evidence on this transaction until it is determined that the exhibit is admissible in evidence.

The Court: I will overrule your objection. He is qualifying the witness now and the lands and proceeding to show the comparability of the land, and when he finishes and makes the offer, why then you can examine.

Mr. Galles: Perhaps I am premature, but I want to get my objection in before any values are testified to.

The Court: Make your objection as to values when the time comes.

(Testimony of Richard Allen Ray.)

Mr. Schiltz: Will you read the last question, Mr. Reporter?

(Question read back by Reporter as follows: Question, Directing your attention again to Defendants' Exhibit No. 2, will you mark on that exhibit the general location of these 1,880 acres?)

Q. Will you do that, please, Mr. Ray?

(Witness does as requested.)

Q. Just draw a rough circle generally outlining the area involved.

(Witness does as requested.)

Q. Will you write there "Kolstad to Ray"?

(Witness does as requested.) [261]

Q. Now, looking at the map, I notice you have marked an area that is roughly seven or eight miles to the east of the Kolstad land?

A. That's right.

Q. That is, the Kolstad lands involved in this case, is that right? A. Yes, that's right.

Q. Now, how are these lands located with reference to the Marias River?

A. Oh, I think they are about—the south end would be about three miles north of the Marias River.

Q. How are they located with reference to Cottonwood Creek?

A. They would be west about, well, maybe a little more than that, maybe 7 or 8 miles.



(Testimony of Richard Allen Ray.)

Q. With reference to the Great Northern Railroad, how are they located?

A. Nine miles south.

Q. Are these lands in what you would call the winter wheat belt?

A. Yes, it is getting down where you can raise winter wheat pretty consistently.

Q. Of these 1,880 acres, how many were cultivated?

A. Everything but 20 or 30 acres.

Q. Substantially all of them were cultivated?

A. Yes. [262]

Q. Were there any improvements on these lands?

A. Yes.

Q. What was the nature of the improvements?

A. Buildings, a real good set of buildings.

Q. What kind of buildings?

A. There was a house, a four or five room house; there was a Quonset hut and some granaries plus a shop and another small building, a one room bunk-house.

Q. How do the lands involved in this sale, from your knowledge, compare with the lands belonging to Clarence Kolstad and Alta Kolstad and the joint lands of Clarence and Alta?

A. It is all getting down there in the same neck of the woods. It is pretty comparable. They both raise winter wheat pretty regularly.

Q. What was the selling price for these lands, or the purchase price, in your case?

Mr. Galles: I will object as the exhibit is the best evidence.

(Testimony of Richard Allen Ray.)

The Court: The objection is sustained. There has been no foundation laid yet, either, sufficient foundation of similarity with reference to terms. I suppose they appear in the exhibit.

Mr. Schiltz: At this time we offer into evidence Defendants' Exhibit 20.

The Court: Is there objection? [263]

Mr. Galles: May I question the witness with reference to this exhibit?

The Court: Yes.

Mr. Galles: Do you and your mother own this land now, Mr. Ray? Was this contract for deed completed by delivery of the deed in escrow to you and your mother?

A. That's right, it was in escrow in the bank.

Mr. Galles: And you paid the full purchase price, that is, the terms of the contract?

A. The terms of the contract, right.

Mr. Galles: You paid the full purchase price?

A. Yes.

Mr. Galles: And then you have since sold it?

A. That's right.

Mr. Galles: And given a deed back?

A. Yes.

Mr. Galles: Wasn't there a cancellation of this contract?

A. No, we just gave the contracts back.

Mr. Galles: You just exchanged contracts, destroyed the contracts, or gave them back?

A. Yes. It was taken back out of escrow and re-

(Testimony of Richard Allen Ray.)

turned, all the papers and everything was returned back.

Mr. Galles: So that the transaction was never completed, was called off? [264]

A. No, it was completed right down to the last letter. Everything was supposed to be recorded. The only reason it wasn't recorded was just neglect. If it was recorded, it would never have been turned back.

Mr. Galles: If it were in escrow, you intended that neither party could record it?

A. It could still be recorded.

Mr. Galles: If it is in escrow? A. Sure.

Mr. Galles: When were the papers withdrawn from the escrower of the transaction?

A. Sometime in March, 1956.

Mr. Galles: March of last year?

A. That's right.

Mr. Galles: That was how many months? This is dated October 14th, so it is about five months after you entered into this contract that the papers were withdrawn from the escrow arrangement?

A. That's right.

Mr. Galles: Well, what money was transferred between Mr. Kolstad and yourself and your mother at the time these papers were withdrawn from escrow?

A. Well, the same amount of money that was paid to begin with, the down payment and half the escrow charges, some interest. [265]

Mr. Galles: What was the down payment in this?



(Testimony of Richard Allen Ray.)

A. It was 29 per cent.

Mr. Galles: That was \$68,875?

A. I guess that is what it was.

Mr. Galles: Whatever is stated in there?

A. Whatever is stated in there is what it was.

Mr. Galles: You and your mother had paid that amount? A. Yes.

Mr. Galles: And then that same amount was received back by you about five months later from Mr. Kolstad?

A. Yes, received from Mr. Kolstad.

Mr. Galles: Plus commissions?

A. Plus commissions and escrow charges and everything else.

Mr. Galles: I object to the introduction of this exhibit, your Honor, and the use of the sale as comparable in that it appears that it was not a completed transaction, the contract was not carried out.

The Court: He says it was.

Mr. Galles: That is, however, his opinion. I don't believe he is qualified. I think the facts he has testified to will show they started out on this contract and then called it off.

The Court: Develop it then more clearly.

Mr. Schiltz: I was going to suggest, your Honor, that before ruling, I would like to ask a few more questions if I [266] may.

The Court: Yes.

Q. (By Mr. Schiltz): Mr. Ray, you have testified that the transaction was completed, you signed these papers, each of you took a copy, one copy was escrowed at the bank together with a deed for the

(Testimony of Richard Allen Ray.)

land, the abstract was continued and was examined by your attorneys, you accepted the title, the abstract itself was escrowed with the bank, is that right?       A. Right.

Q. You paid your money as a down payment, is that correct?       A. Yes.

Q. As a part of the purchase price, did you also pay the real estate commission to Mr. Fox?

A. Yes.

Q. That had been paid?       A. Yes.

Q. So, as far as you were concerned, you had bought yourself a piece of land?

A. That is correct.

Q. Then how did it come about that this contract was eventually given back to Mr. Kolstad and the papers, or the deeds and papers and so on released from escrow, how did that happen?

A. Sometime after the contract had been completed, why we heard Mr. Kolstad wasn't too happy that he had sold. We [267] didn't know——

Q. In other words, he wished he hadn't sold, is that right?

A. Yes, he thought it was a pretty good farm, and he doubted whether he had done himself too much good by selling, so we seen him sometime later and talked it over. He mentioned he would like to have it back, and nothing was done.

Q. Have you known Mr. Kolstad quite a few years, many years as——

A. Yes, many, many years.

Q. Friendly with him as a neighbor?

(Testimony of Richard Allen Ray.)

A. Yes.

Q. So what happened with regard to allowing it to be released from escrow?

A. Sometime after the first of the year, I think it was in February, we had gone down to Great Falls, and Mr. Kolstad set us up down there in Great Falls and asked if it was all right with us, he would like to have his farm back, and he would take care of all the charges and see to it that we weren't out anything if he could have it back.

Q. You and your mother agreed to let him have it back?

A. Yes.

Q. You were perfectly willing to continue with the contract?

A. Yes, it was fine.

Q. Under the terms of—in your letting him have the property [268] back and releasing the papers from escrow, were you made whole so you weren't out any money?

A. Yes.

Q. He returned your down payment?

A. That's right.

Q. He paid the escrow charges?

A. That's right.

Q. Did he pay the interest that you were entitled to as a result of having your down payment tied up during that period of time?

A. Yes, there was some interest involved.

Q. Did he also reimburse you for the real estate commission you had paid to Mr. Fox on his behalf?

A. Yes, he paid that in full.

Q. So, in effect, really you sold the property back to Mr. Kolstad, is that right?

(Testimony of Richard Allen Ray.)

A. That's right, yes.

Mr. Schiltz: We renew our offer of Defendants' Exhibit No. 20.

The Court: Let me see the document. When you say the contract was completed, you mean it was signed, is that what you mean? You didn't make all the payments that the contract required?

Mr. Schiltz: I am sorry. They didn't make all the payments. They made all the payments they should have made. [269]

The Court: He didn't make all the payments as required by the contract.

Mr. Schiltz: Let me say this: As of that date, he made all the payments under the contract.

The Court: Yes, you can't do everything at once, but the contract requires more payments, I suppose?

Mr. Schiltz: Over a period of years.

The Court: He didn't make all the money payments. The objection is sustained.

Mr. Schiltz: You are excused, Mr. Ray.

#### Cross-Examination

By Mr. Galles:

Q. Just a minute, I have a couple questions on the sale you made to Mr. Kamerzel. You stated there was some growing crop on that land?

A. There was some seeded crop, yes.

Q. Well, seeded. The sale was made when?

A. The first of April, the first part of April.

Q. Isn't it true the contract was dated April 14, 1955?

A. It could be.

(Testimony of Richard Allen Ray.)

Q. The middle of April? A. Yes.

Q. And that there was 320 acres of winter wheat growing at that time, or seeded? [270]

A. Yes, that's right.

Q. And there was 200 acres of summer fallow?

A. Yes.

Q. And in 1955, you had a pretty good stand of wheat about that time, didn't you?

A. That early it wouldn't show up very much. It was kind of dry that early in April. It was there, but there was nothing definite about it.

Q. Do you know what Mr. Kamerzel eventually took off that 320 acres of winter wheat that fall?

A. No, I wouldn't. I was never around there when he cut it or anything. I was busy.

Q. I see. What was the value of the granary that was on there? A. I think I stated \$2,000.

Q. Yes, I believe you did. And all but three or four acres of this was cultivated, and it was what you might call blocked out nicely, wasn't it?

A. Pretty fair.

Mr. Galles: That is all.

Mr. Schiltz: That is all.

The Court: Call the next witness. You are excused.

(Witness excused.)

Mr. Schiltz: The next witness will be a fairly long witness, your Honor. Is this a good time for a recess? [271]

The Court: Take a recess at this point? All right.



(Jury admonished.) Court will stand in recess until 11 o'clock.

M. J. HOLBROOK

called as a witness on behalf of defendants, being first duly sworn, testified as follows:

Direct Examination

By Mr. Schiltz:

Q. For the record, will you state your name, please? A. My name is M. J. Holbrook.

Q. Where do you reside, Mr. Holbrook?

A. I reside on my farm outside of Portland, Oregon.

Q. What is your occupation?

A. Real estate consultant and appraiser.

Q. What is your educational background generally?

A. I graduated from the public schools in Portland, then attended St. Martin's College just outside of Olympia, Washington. I attended Stanford University, and I have taken specialized courses in my field.

Q. Give us a summary of your business activities since college?

A. I was first employed by Norris, Beggs and Base, who are one of the largest real estate firms on the Pacific Coast, having offices at that time in Seattle, Tacoma, Portland and [272] San Francisco.

Q. What year was that?

A. That was in 1936. I was then employed by the General Petroleum Corporation until 1941, at which

(Testimony of M. J. Holbrook.)

time I resigned and was employed by Commonwealth, Incorporated, which is a real estate firm somewhat larger than Norris, Beggs and Base. I was with them until 1949, excepting for war service. In 1949, I formed a partnership with Mr. Walstrom, and have been in that business since.

Q. What were your duties with Commonwealth, Incorporated?

A. Commonwealth, Incorporated, I was a salesman at the time I was first employed. I then became sales manager of the so-called business property department which handled all properties except homes and subdivisions, and I was later an officer of the corporation.

Q. Now, then, since 1949, since you have had your own business with Mr. Walstrom, what do you call the business?

A. The business has the trade style of Holbrook Walstrom, Property Counsellors.

Q. What is the nature of the work you do now?

A. It is entirely appraisal and real estate consultant work.

Q. How long have you done that sort of work?

A. Since November 1, 1949, as a partnership; since the beginning of my real estate work in 1936 in my other capacities.

Q. As I understand it, you don't do real estate brokerage [273] work now, you are in the real estate appraisal and consultant business and have been exclusively in that business since 1949, is that correct?

A. Correct.

(Testimony of M. J. Holbrook.)

Q. Do you belong to any professional organization or society? A. Yes, to a number of them.

Q. Will you give us a representative list of those?

A. I am a member of the American Institute of Real Estate Appraisers, with the designation of M.A.R. I am a senior member of the Society of Residential Appraisers with the designation of S.R.A. I am a member of the Appraisal Institute of Canada with the designation of A.A.I.C. I am a member of the Institute of Real Estate Management with the designation of C.P.M. I am a charter member of the American Society of Appraisers. I am a member of the American Institute of Real Estate Counsellors. I belong to others, but I consider these to be the more important.

Q. Are all of these organizations and societies having to do with your profession as an appraiser, is that correct? A. Yes.

Q. Is there any particular significance to your membership in these organizations so far as this case here is concerned? A. Yes, I believe there is.

Q. What is significant about it? [274]

A. Well, particularly in the instance of the American Institute of Real Estate Appraisers and the Appraisal Institute of Canada, the requirements for membership are such that they tend to establish the background of the individual and his qualifications.

Q. In other words, you don't just become a mem-



(Testimony of M. J. Holbrook.)

ber by sending in an application blank, is that correct?      A. That is correct.

Q. How does one become a member of these two organizations?

A. Both of them are very similar. They require the minimum requirements for membership are one must be at least 30 years of age, have a minimum of five years' appraisal experience or allied experience, pass two written examinations, submit three appraisals which must be satisfactory to examining committees and then be approved by various local and national groups interested in the membership. The Appraisal Institute of Canada goes further to the extent that they have qualified their membership into two further brackets, one in rural appraisals, and the other in urban appraisals.

Q. Which branch do you belong to?

A. I qualify in both.

Q. How long have you been a member of the American Institute of Appraisers?

A. I believe since 1948.

Q. Have you taken part in the educational program of this [275] American Institute of Real Estate Appraisers?

A. Yes, I have been on their faculty for several years, and I have been in charge of their educational program insofar as courses offered through various colleges in the United States.

Q. Have you taught any courses in appraisal of real estate?      A. Yes, I have.

Q. Where have you taught such courses?

(Testimony of M. J. Holbrook.)

A. At Northwestern, Chicago University, Southern California, Stanford University, several years at Southern Methodist, University of Washington, University of Oregon. This year I will teach at Cornell. Those are representative of some of the colleges at which I have taught.

Q. Have you had any other teaching experience?

A. Yes, I have. I have also taught for various organizations and groups, including realty boards, the Society of Residential Appraisers, the American Society of Appraisers. I have presented courses in Canada to groups such as the British Columbia Assessors.

Q. Have you held any offices in any of the professional organizations?

A. Yes, I have been a president of the local chapters of all of the organizations which I have named, with the exception of the Appraisal Institute of Canada. I have held national office in the American Institute of Real Estate [276] Appraisers as governing counsellor; I have been a national vice president of the Institute of Real Estate Management.

Q. Have you published any articles or books on the appraisal of real estate?

A. Yes, I have published several.

Q. In the years you have been in the appraisal profession, how many appraisals would you estimate you made?

A. I can more accurately answer that for the years beginning with November, 1949, to date be-

(Testimony of M. J. Holbrook.)

cause my appraisals are numbered. I have done in excess of 2,000 in that period.

Q. How do these appraisals break down as to urban and farm appraisals?

A. They are about 40 per cent urban appraisals and 60 per cent farm appraisals.

Q. From the standpoint of the diversity of appraisals you have made, give us some idea of three or four or five different types of appraisals you have made?

A. Yes. I have appraised quite a wide diversity, including volcanic, cinder and coral reefs, large ranches, office buildings, practically the whole field of appraisal that would come before an appraiser.

Q. More to the point for this case, how much wheat and grazing land have you appraised?

A. In the past year, that would be 1955, up until now, I would say about 200,000 acres. [277]

Q. Of wheat land? A. Yes.

Q. How much grazing land?

A. Approximately 100,000 acres.

Q. Where have your appraisals been made for the most part?

A. The bulk of my appraisals have been made in Oregon, Washington, Idaho, California, Oklahoma, Texas, Kansas, Hawaii, although I have made appraisals in other states.

Q. Can you give us a representative sample of clients for whom you have appraised property?

A. Yes, among my clients are the United States Government—

(Testimony of M. J. Holbrook.)

Q. For what departments of the United States Government have you appraised?

A. I have appraised for the Department of Justice, Commerce, Alien Land Custodian, War Assets, General Services Administration, and other branches within the government.

Q. Have you done any appraisals for state governments?

A. Yes, I have appraised for the States of Oregon, Washington, Idaho and California.

Q. Have any of these appraisals involved condemnation actions?

A. I would say that a large percentage of them have.

Q. And the purpose of those appraisals then has been to determine the fair market value of the property to be taken by condemnation? [278]

A. Those in condemnation have been for fair market value, yes, sir.

Q. Have you done any appraisals for corporations?

A. Yes, for a number of corporations.

Q. Give us a small sample of those?

A. Among the corporations I have appraised for have been the Great Northern Railroad, Reynolds Metals Company, Alcoa, General Motors, people of that caliber.

Q. Have you qualified as an expert appraiser in any courts or before any commissions and that sort of thing?

A. Yes, I have qualified before federal courts, state courts and federal commissions.

(Testimony of M. J. Holbrook.)

Q. Now, then, Mr. Holbrook, were you employed to make an appraisal of the lands in Liberty County belonging to Clarence Kolstad and Alta Kolstad, and of the joint lands of Clarence and Alta Kolstad?

A. Yes, I was.

Q. When were you employed?

A. In October, 1956.

Q. By whom were you employed?

A. By you on behalf of the Kolstads.

Q. And what was the purpose of your employment in this matter?

A. The purpose of my employment was to determine the market value of the separate—my original employment was to determine [279] the market value of the entire ownerships of the Kolstads, and eventually the separate ownerships as of May 24, 1955, on a fair market value both before and after the taking by the government.

Q. What is your definition of the fair market value, Mr. Holbrook?

A. Fair market value is the price in terms of money which a willing buyer will pay and a willing seller accept, both parties being fully informed as to all uses to which the property can be put, and the property exposed on the market for an ample time to make a transaction, neither acting under compulsion.

The Court: I might say fortunately his opinion of what is fair market value is also the law, so we don't have any contest.

Q. Is there a generally accepted work procedure



(Testimony of M. J. Holbrook.)

or method which appraisers use to arrive at the fair market value?      A. Yes, there is.

Q. Is there a term appraisers use to describe that procedure?

A. It is known as the appraisal process.

Q. Describe to us what the appraisal process is. What does an appraiser go through when he appraises property?

A. I think quite obviously the first thing that must be done is to identify the property. By identification, you must have its legal description, you must know where it is [280] located, you must have a knowledge of the ownership within it, whether it is the full fee ownership, or whether other rights or interests are involved; you must know the date of the appraisal, and the purpose for which the appraisal is being made. Having determined those things, the next step is to make an estimate of the highest and best use of the property, which will establish your work pattern in collecting the data which will be necessary. You will then collect data which is divided into two broad categories, one being general data, all those things pertinent to the valuation which would have an effect upon the value of the property; and then specific data, which has to do with the particular property itself. Having collected all the data and information, you then process your three approaches to value known as cost or summation approach, the market data or comparative approach, and the income approach. Depending upon the quantity and quality of information which you



(Testimony of M. J. Holbrook.)

have, you will then, from the answers derived from those three approaches, arrive at your opinion of value. Upon doing that, you will complete your appraisal assignment.

Q. With reference to this particular appraisal assignment, that is, of the Clarence Kolstad lands and the Alta Kolstad lands and their joint properties, describe what you did to appraise those lands.

A. Yes. Upon accepting the assignment to appraise the [281] lands, I requested that maps, aerial photos, operating statements, legal descriptions, and any information bearing upon title be forwarded to me so that I could begin my work and formulate the work plan for collecting my information. Upon having had an opportunity to go over those factors and elements and establish my broad plan of appraisal, I then came to Great Falls, at which time I made an investigation of the availability of money, interest rates, the general tenor of farm sales within the area, and other pertinent information. I also employed at that time another appraiser to assist me in collecting the information which I required. I was there several days. From Great Falls, I went to Shelby and in Shelby, I went to the Assessor's office to secure the information which was available to me there concerning acreages, broad land classifications and tax information. I also observed their maps and such aerial photographs as they had. In addition to the Assessor, I went to the County Agent, I went to the Soil Conservation. I discussed the general as-

(Testimony of M. J. Holbrook.)

pects of agriculture in the area in which I was concerned; I discussed soil types; I secured soil maps. I also talked with the Soil Conservation man who had just completed a complete soil reconnaissance of the Chester area. I found what crop yields were; I found what their estimates of relative values of land insofar as productivity were, and secured from them a great deal of [282] reference material upon which I could check. From Shelby, I went directly to the Kolstad properties, and I went over them by automobile and walking. I might say I am a little ahead of myself. Prior to going to Shelby, I flew over the entire property in the Triangle area.

Q. What was the purpose of that?

A. There were two purposes. One of them was to determine what was within the Triangle area, its scope, its land uses and land patterns.

Q. When you say Triangle area, you mean the triangle made by a line drawn from Great Falls to Shelby to Havre and back to Great Falls?

A. That's right, yes. And specifically, I flew over the Kolstad lands so I could envision them in their entirety and make my first determinations as to a broad classification of land use, and also the position of that farm in relation to the general area in which it was lying. I spent quite some time over the property in the air. It was then following that that I went to Shelby with the background of knowing then specifically what I wanted to look for so I could relate my information to what I had seen. From Shelby, I went on to the Kolstad properties, and

(Testimony of M. J. Holbrook.)

with the background I then had of soil information and having seen the properties from the air and other data which I had, I made my first or preliminary examination. From the Kolstad [283] properties, I then went into Chester, and in Chester, I repeated the things I had done in Shelby. I went in the Assessor's office and examined the maps and records and classifications and acreage breakdowns and asked about tax matters. I also went to the County Agent and discussed with him a number of the same things I had discussed in Shelby, including the type of crops, the best farming practices, the economies in size, the grazing facilities of the community, the general conception of good agricultural practice. I then went to the Allotment Office and secured information concerning allotments and allotment practices as applied to this specific area and property. I examined the maps which they had of the detailed breakdown of the lands which was on file there. Having done these things, I came on into Havre, and in Havre, as I had in Great Falls, I consulted with various informed people such as brokers and others who had interests in lands of this kind as to their general conception and opinions. Having gotten all this information together, this data, which was still unclassified and just a mass of information, I then sat down to sift it out and to, well, take the wheat from the chaff was what it amounted to. Having boiled it down to where it could be utilized as good directive information, I correlated that with sales information which I had had prepared for me

(Testimony of M. J. Holbrook.)

by the abstract offices in both Shelby and in Chester. I had requested that [284] sales of land over a five year period within a given section be detailed for me in total as to grantor, grantee, that is, buyer and seller, the date, terms, acreages and have them located on maps for me.

Q. Now, what size was the area in which you asked for that information?

A. It comprised approximately nine townships in the immediate vicinity of the Kolstad properties, including that area.

Q. Proceed.

A. With the sales information, with the soil information, with the crop information and all the other information which I then had, I then began the process to arrive at a preliminary estimate of value to check against the information which I had found. At this time, I, also going back to the interest rates, the lending practices of the area and so forth, worked out my preliminary estimate of the income approach to value on the property, including crop yields and animal units.

Q. Now, in arriving at your opinion of value, did you take into consideration the average annual precipitation in this Chester area?

A. Yes, I made a check into that.

Q. What did you find it to be?

A. I found there was no accurate gauge for the immediate [285] Chester area. There were good records for Shelby, Dunkirk and Joplin, and there were estimates by informed people as to the Chester area,



(Testimony of M. J. Holbrook.)

which indicated between 11 and 13 inches of rainfall per year, with an average of about 11.8 inches.

Q. If you know, what is the minimum annual rainfall for economic dry land farming?

A. The absolute minimum would be eight to nine inches per year, the bulk of it falling during the crop season.

Q. I think you stated there were no precipitation records for Chester itself?

A. None for Chester itself, that is correct. It is bracketed on either side.

Q. From the investigations which you made of the soil of the Kolstad properties, what conclusions did you reach with respect to this area?

A. The soil within the Kolstad properties is known as Bainville loam, Joplin loam and Joplin fine sand loam. Those are local names of soil types. In classifying the productivity of the farm and other considerations, it would be classed as Class 3.

Q. Now, when you say Class 3, you mean by that this is third class land?

A. No, the classification is on a scale of eight, depending upon terrain, rainfall——

Q. Whose scale is this? [286]

A. This is a Department of Agriculture scale which is generally accepted as being the most accurate measurement because it takes into consideration all of the things necessary, whereas just the name, for instance, Joplin loam, doesn't indicate which condition it is in. Class 3 in the instance of this area, the Chester area, means it is the finest



(Testimony of M. J. Holbrook.)

property in the county. This is rated as a high class 3.

Q. Is there any class 2 or class 1?

A. There is not, primarily because of the rainfall, which is the greatest restrictive element.

Q. If you had more rainfall, say up to 16 or 17 inches, this might become class 2 or class 1?

A. It would become class 2 at about 16 inches.

Q. When would it become class 1?

A. At about 30 inches.

Q. What did you find concerning soil depth in this particular area?

A. From soil reconnaissances which have been made and from my own examination of the property, I found the soil ran very deep in most places. Obviously, it shallowed out on knolls, and there was a characteristic change as you came to the river breaks, but the land in wheat cultivation there, that had been plowed, had a soil depth, as far as I could determine, and also from information from the [287] soil reconnaissance, from 25 to 30 feet in depth.

Q. In your own examination, how did you determine the depth of the soil in that area, did you make a visual inspection of it?

A. For soil depth, if you don't have an auger or any other way of excavating, the best way is to look for breaks in the land or cuts or where the land breaks off to a different elevation, at which points you have a cross section of what is before you.

Q. I take it from your testimony concerning soil, so far you have been talking about the Kolstad

(Testimony of M. J. Holbrook.)

properties and the area immediately surrounding them, is that correct?      A. Yes.

Q. How does the soil on these properties in that area compare with soil in the adjoining areas, the general neighborhood?

A. There is a very decided change to the south and to the east and to the west and to the north. This is relatively a restricted area insofar as the best soil groups are concerned.

Q. Have you been able to define the limits of this soil classification you made here?

A. Yes, in my opinion, I have boundaries for the soil classifications.

Q. How do you bound that area? [288]

A. It is bounded on the north generally by the Great Northern Railway; it is bounded on the east by Cottonwood Creek; it is bounded on the south by the Marias River, and it is bounded on the west by a point approximately half way between Chester and Shelby.

Q. Do these differences in the soil between the area you just outlined and the adjoining areas have any effect on your opinion of the relative or comparative value of the Kolstad lands?

A. Oh, yes, very definitely.

Q. In your determination of the fair market value of the Kolstad lands, did you consider the yields in the area?      A. Yes, I did.

Q. And what did you find that to be?

A. I beg your pardon?

Q. What did you find the average yield in the area to be?      A. In the area?

(Testimony of M. J. Holbrook.)

Q. What we might refer to as the Chester area?

A. The average yield of the area is approximately 19 bushels, the average yield of the county is 17.4 bushels; in the immediate vicinity of the Kolstad properties, it is approximately 21 bushels.

Q. Where did you get this information?

A. I secured that in part from Bozeman, in part from Department of Agriculture pamphlets, and in part from [289] examination of Mr. Kolstad's records, and from discussing the matter with qualified and informed people in the area.

Q. In your determination of fair market value of these Kolstad properties, did you consider the price of wheat?

A. Yes, I did.

Q. And what did you find that to be?

A. The price of wheat, of course, varies from year to year, and it varies within the months of each year, and varies also in accordance with protein content. I arrived at what I considered to be an average price that would apply to the Kolstad properties.

Q. What is that price?

A. Two and a quarter a bushel.

Q. That includes the protein premium over and above the price?

A. I utilized \$2.25 per bushel as being the average annual expectancy of wheat price from that particular property.

Q. Does that price consider Chester will be the shipping point?

(Testimony of M. J. Holbrook.)

A. Chester or Galata or one of the towns in the immediate proximity.

Q. That is the price at the shipping point?

A. In my consideration, that would be the average of the price, yes. [290]

Q. Now, then, this area you have outlined for us as having superior soil, does that also, from your determinations, control the market area to some extent?

A. Yes, very definitely.

Q. And what is the nature of that market area?

A. You mean as to the particular one which I have bounded?

Q. Are prices generally higher within that area than outside of that area?

A. Yes, they are higher, and they are higher for the very reasons by which the area is bounded. As you go outside these general boundaries which I have described, you are going from winter wheat to spring wheat; you will have a tendency to change in protein content, and you will have a very marked tendency to change in yields per acre, so all of those are elements which go to create value in wheat land.

Q. In considering sales, would it be your opinion that any sales outside of this area that you may have considered in your determination of fair market value would require some adjustment to compare them with the properties inside of that area?

A. Yes, they would require very major adjustments, because when you compare land, as an example, which is yielding 21 or 22 bushels against land yielding 10 or 12 bushels, you have very large



(Testimony of M. J. Holbrook.)

adjustments to make. When comparing winter wheat as against spring wheat, you have another adjustment [291] to make; when you have problems with rock and gravel and sand and other elements in soil, again you have to make an adjustment, so by the time you begin to make all of these arbitrary adjustments, you have a chance to make a very large error in your considerations.

Q. What is your definition of a comparable sale?

A. Well, a comparable sale—let me first state it this way: There are no two pieces of land in the world which are exactly alike, so a comparable sale is a sale which has been made under the definition of market value——

The Court: Just a minute. You are asking the witness to define the law, and I don't think that is proper.

Mr. Schiltz: I will withdraw the question.

The Court: It is a matter of you presenting evidence of a comparable sale and the Court deciding whether or not it is admissible for the jury to determine its comparability under the instructions of the court.

Mr. Schiltz: Withdraw the question.

Q. Did you find from your investigations any trend in Montana and in this area as to the size of dry land farms?

A. Yes, a very marked trend. Since 1920 the number of dry land farms has been decreased, and the acreage per farm has been increased very ma-



(Testimony of M. J. Holbrook.)

terially. Both Liberty and Toole Counties have very high acreage farms.

Q. Have you any idea of the average size of farms in these [292] counties?

A. Yes, they would approximate a minimum of 1800 to 2000 acres per unit.

Q. Did you take into account, then, the size of the individual Kolstad properties in your determination?

A. Yes, that is a very definite part of my considerations.

Q. Now, then, you testified that you had the abstractor make a rundown for you of all sales in the area and that you gave consideration to these sales. What did you find from that information, what did you conclude?

A. Well, first, I had something over 100 sales to look at, which, having established certain comparable items in relation to soil, location to market, and other factors, I was able to eliminate a great number of them, and then coming down within the area of the Kolstad lands where you have the best areas of comparability, I found only three sales. There are other sales which are on the perimeters of this area which I have bounded, but the adjustments necessary are so great, it would lead, in my opinion, to a high degree of error, so from that, I found that the sales tended to establish a floor, or the base from which the unit value of land could be established.

Q. After you had secured all the data having any bearing on the fair market value of the lands

(Testimony of M. J. Holbrook.)

generally in the Chester area and the Kolstad properties, did you proceed to [293] appraise the lands belonging to Clarence Kolstad?

A. No, prior to doing that, I then went back and made a more rigid classification as to highest and best use of the lands.

Q. What did you classify the Clarence Kolstad lands as, as to the highest and best use?

A. Its highest and best use is for dry land farming, currently for raising wheat and secondary grains such as barley. Probably there is a portion of the area that would best be adaptable and suitable for grazing.

Q. How many acres did you determine Clarence Kolstad had in his tract of land before taking?

A. Mr. Kolstad had in rounded acres, approximately 5179 acres.

Q. And how did you classify this land as to use?

A. I broke them into three broad classifications, as plowed, tillable—that land which could be plowed and put into crop, but had not been broken—and grazing.

Q. How many acres of plowed land did he have?

A. In rounded acres, approximately 2550.

Q. How many acres of tillable land?

A. Approximately 834.

Q. How many acres of grazing land?

A. Approximately 1795.

Q. Are you familiar with the maps we have been using [294] throughout the evidence in this case?

A. Yes, I assisted in the preparation of them.

(Testimony of M. J. Holbrook.)

Q. Now, do the figures which you have just given compare substantially with the outlines on the maps?

A. Yes, they are correlated very closely.

Q. Now, then, I notice you said you classified 1795 acres of grazing land? A. Yes.

Q. Does that include bottom and alfalfa as well as upland grazing?

A. Yes, I have classed all of the types of land on which cattle would run as being grazing rather than breaking them into separate component parts.

Q. Anything not plowed or tillable, you have classed as having a highest and best use as grazing land? A. Yes, that is correct.

Q. Now, after the taking of the lands on May 24, 1955, how many acres did Clarence Kolstad have left, according to your classification?

A. After the taking in total?

Q. Yes.

A. He had approximately 1400 acres remaining.

Q. How did that classify?

A. That broke into the same three classifications as I utilized before, but into two units, one unit being south of [295] the Marias River, and the other north of the Marias River. In that area south of the river, there were 70 acres of tillable land, and approximately 10 acres of grazing land. To the north of the Marias River in the plowed land there is approximately 807 acres, in tillable land, approximately 309 acres, and in grazing land, approximately 202 acres.

(Testimony of M. J. Holbrook.)

Q. Now, I direct your attention, Mr. Holbrook, to what has been marked as Defendants' Exhibit 5, and ask you if you recognize this map as depicting the Clarence A. Kolstad properties?

A. Yes, I do.

Q. Now, then, these are the lands (indicating) you are talking about now, the lands after the taking, is that correct?

A. Yes, that is correct.

Q. Now, then, Mr. Holbrook based upon the matters and facts to which you have testified, including your descriptions of the lands you classified, of their highest and best use, their productivity, and sales, do you have an opinion of the fair market value of the Clarence A. Kolstad lands before the taking on May 24, 1955?

A. Yes.

Q. What is that opinion?

Mr. Galles: Just a minute, please, I object to the question as no proper foundation has been laid in that I don't [296] believe it was shown when he visited the lands and the condition of the lands when he visited them.

The Court: With reference to what?

Mr. Galles: Well, your Honor, yesterday, I think the witness Clarence Kolstad said that the land was flooded or partly flooded, and I would like—I think it goes to the admissibility of this evidence as to whether or not—

The Court: Examine him a little further with reference to when he examined the lands.

Q. When did you go upon these lands?



(Testimony of M. J. Holbrook.)

A. I was first on the Kolstad properties in November of last year. I was again on them in December of last year, and I have been on them within the past several days.

Q. At the time that you went on the lands, Tiber Dam was filling up, is that correct?

A. Yes, that's right.

Q. Were you able to secure information concerning the lands that were covered by the Tiber Dam Lake?

A. Yes, I secured a great deal of information concerning them, also pictures, and I had other matters of record before me which assisted me in looking at the area as to the relationship of that area flooded to the whole.

Q. Did you examine aerial photographs concerning the properties that were covered?

A. Yes, I did. [297]

Q. Did you compare the bottom lands covered by the Tiber Dam Lake with similar lands, bottom lands below the dam?

A. Yes, I did.

Q. In your opinion, were you able to secure sufficient information in order to form an opinion as to the value of those lands?

A. Yes, with no difficulty.

Mr. Schiltz: We renew our question.

Mr. Galles: Your Honor, I will continue to object. This witness may be able to testify as to the value of the remaining lands which he had available to him for examination, but I will object to the



(Testimony of M. J. Holbrook.)

testimony of his opinion of value of the entire ownership.

The Court: I think we had better have a discussion because this is important to you. (Jury admonished.) Court will stand in recess for five minutes.

(Five-minute recess.)

(The following proceedings were had in the absence of the jury:)

The Court: What is your position?

Mr. Galles: Your Honor, according to the information I have received as to the level of the water on November 20, 1956, according to the official records, which we can establish by proper evidence, of course, was that elevation 2972.76 was reached. I believe the crosshatching on the map [298] was testified to as being 2980, which is just eight feet higher. It might cover quite a little area horizontally in some cases, still not so much in others, depending on the incline. By further rough calculations by somebody qualified to testify to the number of acres under water at the time this witness examined the lands, we have in the Clarence Kolstad land 1728 acres that were under water, and, of course, that is the parcel he is about to testify to, and that is out of the 5180 acres of the total parcel.

Mr. Schiltz: Your Honor, we don't contend the land wasn't covered. As a matter of fact, more land was covered than Mr. Galles stated.

(Testimony of M. J. Holbrook.)

The Court: Yes.

Mr. Schiltz: But he has testified he examined aerial photographs and actual photographs of the property, made investigations from talking to people and finding out what the land looked like compared with other lands, and he found out they were similar to the ones below the dam, he has a reasonably good record of how many acres were cultivated. I plainly and frankly admit it isn't so much whether he has seen the land or not, he has got data from which he can form an opinion. The weight which can be given to the opinion by reason of his not having seen the land is a question to be submitted to the jury under proper instructions, or Mr. Galles can argue to the jury that he has considered wheat [299] production off of wheat lands that were submerged, he has considered animal units, he has testified to grazing lands under water. That can be argued to the jury, but he has production data and other data on which he can form an opinion.

The Court: Isn't it quite obvious he doesn't have production data from acres under water?

Mr. Schiltz: He has testified he made an investigation as to production from the various parcels of land.

The Court: Including what was under water, but how do you attribute anything to what was under water, when he never saw it, from records. Does what the records show all come from what was under water, or does half, or does none of it?

Mr. Schiltz: He knows from Soil Conservation

(Testimony of M. J. Holbrook.)

records what acres were plowed and tillable and the soil conditions. I submit it is a jury question of the weight to be given to his opinion by the jury.

The Court: When you are faced with a question like this—aren't you faced with the necessity of submitting to the witness a hypothetical question when the witness hasn't seen it. When an expert hasn't seen the fact, don't you have to submit to him the fact or facts, then, in order for him to express an opinion about them? Don't you have to submit a hypothetical question based on the facts in evidence, not on something we don't know about? [300]

Mr. Schiltz: Aside from having seen the land, he knows as much as there possibly can be known about that land.

The Court: If he can testify, of course, that from what he saw, he can tell——

Mr. Schiltz: Not only what he saw of the land itself, but from investigations he made about the land.

The Court: From what he saw and from his investigation, if he can testify that he knows what the land and under water was.

Mr. Schiltz: He has so testified.

The Court: Has he said that?

Mr. Schiltz: Yes, he testified that his classification of this land is in substantial agreement with the classifications as shown upon this map.

The Court: Well, yes, he has said that, but doesn't he—wouldn't he be required, if it is admissible at all, wouldn't he be required to say, "While

(Testimony of M. J. Holbrook.)

the land is under water and I never saw the land, from the information I have detailed to you, I can tell you what kind of land that is." Wouldn't he have to be able to say that?

Mr. Schiltz: I think he has said that.

The Court: I don't understand he has. It may be from what he has said you could draw that inference.

Mr. Schiltz: He has testified from soil maps he knows where the land breaks, where the difference in soil comes in, soil types; he has said that south of the river the land is [301] and the soil is a little lighter and a little shallower, not quite as good. He has testified as to everything you could possibly find out about the land, I submit, whether he saw it or not.

The Court: Doesn't he have to say, to take it one step further and say, "From all of that I can tell you what the land is underneath the water." He has to take one step further, just that plainly, just that simply.

Mr. Schiltz: I think he has done that when he stated the classification of the lands——

The Court: If that is what his opinion is, and if he is qualified to say that, all he has to do is say it, we don't have to take it upon any inference.

Mr. Schiltz: He can say it again, then.

Mr. Galles: I understand him to say he could tell what the lands under water were like by making comparisons with other lands along the Marias River, comparing those lands not flooded, which apparently



(Testimony of M. J. Holbrook.)

he looked at, although he didn't say so, with aerial photographs of the subject property.

The Court: Of course, if a man says he can do that, I suppose he is entitled to his opinion, and then it would be a question for the jury to determine whether or not to give any weight to it.

Mr. Schiltz: If I may make one further suggestion, your Honor, it has a bearing on this situation. I have tried cases [302] before the Indian Claims Commission under the same rules as prevail in Federal Courts. It is customary in these unique cases for appraisers to evaluate lands, some the government uses, and some we use, to evaluate lands as to how they looked and how they were in 1868. They can't have seen the lands as they were then, but they get all the information they can get. If that information is weak, the case is weak. I submit that is the case here. He has made every investigation he can make. In his opinion, he thinks he knows what the lands looked like, how they were used, and what they would produce.

The Court: An expert can tell you the geological formation of 15,000 years ago, and he can tell you what it looked like, I suppose.

Mr. Schiltz: We have here the added advantage, and he so testified, of a witness who has made inquiries of contemporaries. This is only a year ago, six months ago. He made inquiries of people who knew the land and found out all about the land. I submit he knows as much about the land as anybody before it was flooded short of the landowner himself.



(Testimony of M. J. Holbrook.)

The Court: That is all true. If he can testify that he knows what the land looked like and its characteristics as a result of the information that he has detailed to us on the stand, why then, I suppose he is qualified to express that opinion. If he says that, he can tell us. [303]

Mr. Schiltz: It is simple enough.

The Court: But we can't assume—in other words, I don't think he can go upon the stand and testify as to hearsay just because he claims to be an expert on market value.

Mr. Schiltz: Well, I think nine-tenths of what an expert testifies on is hearsay, as a matter of fact.

The Court: It may be, but he can't testify as to what this land is, the land that is under water, he can't testify as to what it is on the basis of what somebody else told him unless it is presented to him in the form of a hypothetical question, unless it is evidence in on the record. In other words, isn't it true that you could bring a witness in that has never see the land, and he would say, "Yes, I have an opinion of the value of the land under water there"——

Mr. Schiltz: That can be done.

The Court: "It is one million dollars," but what is it based on.

Mr. Schiltz: I think that is possible.

The Court: But you have to present the facts first, and you have to present to the Court the fact of expertness. This man has to be able to tell the Court and jury he can tell you what kind of

(Testimony of M. J. Holbrook.)

land this is under water although he has never seen it. Now, if he can, and I suppose he can——

Mr. Schiltz: Let me put it another way: A doctor can testify in a personal injury case that this leg is broken. [304] He has an X-ray to see it. He has never seen the leg, he has never seen the man.

The Court: That's right.

Mr. Schiltz: This man has not only an X-ray, he has aerial photographs, all the information——

The Court: That is all he has to tell us then is that from aerial photographs—if all the information he bases his opinion on comes from aerial photographs—all he has to do is say, "Yes, I saw the aerial photographs of this land, and I can read those photographs and tell you it is the same kind of land I saw below the dam."

Mr. Schiltz: I think he has done that. Then from that point on, it is just a question of the weight.

The Court: Isn't that so, counsel, do you take any other position?

Mr. Galles: No, I believe it is probably right, although I would like to be able to look at a book or two right now and see if I can find anything.

The Court: I agree with you, counsel, he doesn't have to have seen the land, but if from any other information he has given to us here, he can express an opinion, then all we have to do is have him express that opinion. I didn't believe it was clear. I don't think it was clear, although it may

(Testimony of M. J. Holbrook.)

be taken as an inference from all he has said. I don't believe he has specifically said, "From the information I have had, [305] I can tell you what kind of land this was under water."

Mr. Schiltz: I will see to it that he says that.

Mr. Galles: Maybe this comes under the special qualifications of evaluating coral reefs.

Mr. Schiltz: So I understand, I don't propose to put a hypothetical question——

The Court: No, no, you don't have to if from the information he has given us already he says he knows.

Mr. Schiltz: I understand.

The Court: Court will stand in recess until two o'clock.

(Noon recess.)

(The jury returned to the Courtroom, and the following proceedings were had in the presence of the jury:)

Mr. Schiltz: Your Honor, we have no further questions of the witness regarding his qualifications, and we renew our last question as to what his opinion of the value is.

The Court: I have had the reporter read the record to me during the recess, and I will overrule the objection of the government.

Mr. Schiltz: We will go ahead and ask for his opinion?

The Court: Yes.

Q. (By Mr. Schiltz): Just so that we get ori-

(Testimony of M. J. Holbrook.)

ented here a little bit, Mr. Holbrook, just before the objection was made, you were asked if you had an opinion as to the fair market value of the Clarence A. Kolstad lands before the taking, [306] and I asked whether that opinion was based upon all the matters and things and investigations you had made and learned and so on in your investigations of that area?       A. Yes.

Q. Do you have such an opinion? .

A. Yes, I do.

Q. What is that opinion?

A. In my opinion, the Clarence Kolstad farm prior to the taking as of May 24, 1955, is \$424,500.

Mr. Wiggenhorn: Give me that figure again.

A. \$424,500.

Q. How does that figure across the board?

A. Approximately \$82 an acre across the board, slightly less than that amount.

Q. Now, then, do you have an opinion, similarly based upon all the investigations you made, do you have an opinion of the fair market value of Clarence Kolstad's remaining lands after the taking, after May 24, 1955?       A. Yes, I do.

Q. What is that opinion?

A. The value after the taking is \$119,300.

Q. And what is the difference between those two figures?       A. \$305,200.

Q. Now, then, included in this figure, do you have any improvements? Are any improvements included in your estimate, [307] in your opinion of before and after value?



(Testimony of M. J. Holbrook.)

A. The improvements included are only those which I saw, which were fencing.

Q. Have you heard Clarence Kolstad testify here in Court yesterday and today? A. Yes.

Q. Have you heard his testimony with regard to fences and sheep sheds and so on?

A. Yes, I have.

Q. As a result of hearing that testimony, are you able to add any further value for the improvements?

A. Not within the Clarence Kolstad property, no, sir.

Q. Now, then, did you classify the Alta Kolstad land for its highest and best use in this area?

A. Yes, I did.

Q. And how many acres did you find Alta Kolstad had before the taking by the United States?

A. In rounded acres, 4699.

Q. And how did these 4699 acres break down according to their use?

A. I have broken them down in rounded acres to 1666 acres of plowed land, 1134 acres of tillable land, and 1898 acres of grazing land.

Q. I recall that Mr. Kolstad testified that he had some alfalfa land and some land that he characterized as bottom [308] land included in this. Do you have any such breakdown?

A. Yes, I do. However, I have taken the bottom alfalfa and upland grazing and combined them all as grazing land because that should be the highest and best use, utilized that way, in my opinion.



(Testimony of M. J. Holbrook.)

Q. Now, then, after the taking by the government, how many acres did Alta Kolstad have left?

A. The acres remaining in rounded acres is 2868 acres.

Q. How does that break down according to its use?

A. That breaks down into 1035 acres of plowed land, 975 acres of tillable land, and 857 acres of grazing land. All of those are rounded acres.

Q. Now, then, based upon the matters and facts to which you have testified, including your description of these lands, your classification of their highest and best use and productivity, the size of the unit, do you have an opinion of the fair market value of the Alta Kolstad land before the taking by the United States on May 24, 1955?

A. Yes, I do.

Q. What is that opinion?

Mr. Galles: To which the government objects on the same grounds as previously.

The Court: Overruled.

A. \$341,350.

Q. How does that come out as an across the board value? [309]

A. It is approximately \$72.50 an acre across the board.

Q. Similarly, do you have an opinion of the value of the Alta Kolstad lands after the taking by the United States on May 24, 1955?

A. Yes, I do.

Q. What is that opinion?

A. \$215,500.

(Testimony of M. J. Holbrook.)

Q. And I take it that \$125,850 is the difference and the damage in the taking, is that correct?

A. Yes.

Q. Now, then, are there any improvements involved in this figure of yours?

A. There are no improvements in my figure, no, sir.

Q. Did you hear Mr. Clarence Kolstad testify that on this land was considerable fencing, a five room house, barn, work shop, bunkhouse, a small garage, all of the approximate value of \$7,000, did you hear that testimony? A. Yes, I did.

Q. Assuming that testimony to be correct, then your opinion would be \$132,850 for the damage in the taking?

A. That would be correct, yes, sir.

Q. This property was all gone before you ever got on the property, and these houses, barns and improvements and so on, you never saw them?

A. No, I did not see them. [310]

Q. The only way you can evaluate them is by adopting Mr. Kolstad's testimony as to their value?

A. I haven't evaluated them; I am accepting his figures.

Q. Now, then, directing your attention to the joint land—let me ask you this: Does your breakdown by use classifications agree substantially with the map that we have shown here as Defendants' Exhibit No. 5, which involves Clarence Kolstad's lands?

A. Yes, as I have stated before, I assisted in the preparation of that map, so I concur.

(Testimony of M. J. Holbrook.)

Q. Do your figures likewise agree generally with the map which is shown as Defendants' Exhibit 7?

A. Yes.

Q. Now, then, Mr. Holbrook, directing your attention to the joint lands, lands jointly owned by Clarence Kolstad and Alta Kolstad, his wife, did you likewise classify those lands for their highest and best use? A. Yes.

Q. How many acres were involved in those lands prior to the taking by the United States on May 24, 1955?

A. In my opinion, there is 7423 acres rounded.

Q. How many acres of plowed land do you have?

A. I have 1560.

Q. This is all before the taking?

A. Yes, sir. [311]

Q. How many acres of tillable land?

A. 1754.

Q. And how many acres of grazing land?

A. 4108.

Q. That totals 7423 acres?

A. That will not total that amount because there are fractional portions which would have to be left together to get it to 7423. I have rounded to the fullest acre.

Q. How many acres of plowed land do you show? A. 1560.48, actually.

Q. All right, now, then, just as before, did you break down the grazing land into bottom, alfalfa and grazing, or did you include it all in one category?

(Testimony of M. J. Holbrook.)

A. I included it all in one category, considering there was bottom and alfalfa land and grazing land, yes, sir.

Q. Do your classifications agree with the classifications shown here on this map, substantially?

A. Yes, they do.

Q. Now, then, have you computed the number of acres in the joint lands of Clarence and Alta Kolstad remaining to them after the taking by the United States on May 24, 1955?

A. Yes, sir.

Q. And how many acres do they total?

A. 3519.

Q. How many acres of plowed land did they have left? [312]

A. I have broken the remainder into two parcels, that which lies to the north of the river and that which lies to the south of the river, or the reservoir which is formed.

Q. As shown on this map now, Defendant's Exhibit 10? A. Yes.

Q. All right, how many acres of plowed land did they have in the north unit?

A. In the north unit, 186.

Q. How many acres of tillable land in the north unit? A. 1256.

Q. How many acres of grazing? A. 1030.

Q. Now, then, in the south unit, how many acres of plowed land? A. 1005.

Q. How many acres of tillable land?

A. 188.

Q. How many acres of grazing? A. 235.

(Testimony of M. J. Holbrook.)

Q. Again, the grazing is just as it was before, you didn't evaluate it or figure it out anyway but grazing, you didn't break it down further than grazing land?

A. In this instance that wouldn't be correct. All that remains is upland grazing. The bottoms and alfalfa have been completely taken. [313]

Q. Based upon the matters and facts to which you have testified, including your description of the lands, your classification of their highest and best use and their productivity and size, do you have an opinion of the fair market value of the joint lands of Clarence and Alta Kolstad before the taking on May 24, 1955?

A. Yes, I do.

Q. What is that opinion?

Mr. Galles: To which the government objects for the same reasons and on the same grounds as previously stated.

The Court: With reference to some of the land having been under water?

Mr. Galles: Yes.

The Court: Overruled.

Q. What is that opinion? A. \$416,000.

Q. And how does that figure as an across the board value?

A. Approximately \$56 an acre.

Q. Now, then, do you have an opinion of the fair market value of the joint lands of Clarence and Alta Kolstad after the taking on May 24, 1955?

A. Yes, I do.

Q. What is that opinion? A. \$232,200.



(Testimony of M. J. Holbrook.)

Q. And then the difference, being \$183,800 as the damage in [314] taking?

A. Yes, that is correct.

Q. How does that after value figure out as an across the board value?

A. \$59.50, approximately.

Q. Now, then, were you in court when Clarence Kolstad testified in the way of improvements that there was a large lean-to, a large hog house, a large chicken house, and about 12 miles of fence on this property before the taking?

A. Yes, I was.

Q. Did you hear his testimony that the value of those improvements was about \$8,000?

A. That is correct.

Q. Did you have any improvements figured in your opinions of the values before and after?

A. None other than fencing.

Q. Assuming Mr. Kolstad's figure of \$8,000 to be accurate, then your opinion of the damage in taking would be \$191,800?

A. That is correct.

Mr. Galles: To which we object as not proper. That is a hypothetical question for which sufficient facts have not been laid.

The Court: What facts?

Mr. Galles: Well, Mr. Kolstad just testified generally, and I don't think he gave any specific information sufficient [315] upon which to base a hypothetical question.

The Court: Well, he testified as to the value.

Mr. Galles: Yes.

(Testimony of M. J. Holbrook.)

The Court: And counsel has just said that assuming that that is the value of it, will that change your valuation now that you have given. Objection is overruled.

Q. Now, then, once more——

The Court: Counsel, the witness is not saying that is the value, he just assumes it is.

Q. Once more directing your attention to the Clarence Kolstad lands, did you arrive, or did you determine what the fair market value for the various categories of this land was? In other words, do you have an opinion as to what wheat land per acre is worth in this area, speaking now of the Clarence Kolstad land?

A. I have arrived at an opinion of what the various categories that I have outlined as plowed, tillable and grazing are as related to the total value, yes.

Q. What is that opinion?

A. In my opinion, the plowed land on the Clarence Kolstad place has a value of \$125 per acre, as it relates to this particular unit.

Q. What is your opinion as to tillable land?

A. Tillable land would be——

Q. Referring still to Clarence Kolstad. [316]

A. Yes. It would be approximately \$84 per acre.

Q. What is your opinion on grazing land, bearing in mind that you have included, if there is any in this tract—was there any alfalfa or bottom land in this tract?

A. No—there was bottom land, but no alfalfa.

(Testimony of M. J. Holbrook.)

Q. What is your opinion of the value of grazing land?      A. \$20 per acre.

Q. Directing your attention to the Alta Kolstad land again, do you have an opinion as to the value, the unit value of wheat lands in that area?

A. Yes, the unit value, as it applies to that particular property is again the same as the Clarence Kolstad property, \$125 per acre for plowed, approximately \$84 for tillable, and \$20 for grazing.

Q. Directing your attention now to the joint lands of Clarence and Alta Kolstad, do you have an opinion as to the unit value of the various categories in that tract?      A. Yes, I do.

Q. What is that?

A. For the plowed land it would be \$115; for the tillable, approximately \$76, and for the grazing \$25.

Q. Now, then, I notice that your opinion is that the values were about \$10 lower on plowed and tillable land for these joint lands, can you give an explanation for that?      A. Yes, I can. [317]

A. The joint ownership, insofar as the plowed and tillable land is concerned, the greatest part of that which was under cultivation lies to the south of the Marias River. The Marias River is the breaking point in soil quality. On the south side of the river where this particular property lies, the soil is sandier, it is lighter and shallower, it doesn't have as good a crop history, nor is it as productive land. Therefore, it has lesser value than those deeper loams which are better situated as far

(Testimony of M. J. Holbrook.)

as soil characteristics are concerned on the north side. Insofar as grazing land is concerned, the reason for the increase there is because this land had a large unit which was economic as a cattle unit because of the tendency toward more balance in bottom, alfalfa and grazing land, and it would support more animal units, so that would give us the increased value there. To put it in plain words, this land was more productive for grazing than either of the other two by far.

Mr. Wiggernhorn: Can we have just a minute, your Honor?

The Court: Yes.

Q. Now, then, directing your attention again to the Clarence Kolstad land, did you assign, or is it your opinion that the unit value of these various lands is the same after the taking as it was before the taking? A. No, it is not.

Q. And how much is the unit value of the lands after the [318] taking?

A. After taking it is \$85 per acre, where previously it is \$82 per acre.

Q. What is the reason for that?

A. The principal reason being that the bulk of the low price land has been taken in condemnation. Therefore, the remaining land has a higher value in ratio.

Q. Now, directing your attention again to the Alta Kolstad lands, I recall you testified you broke the land remaining into two units?



(Testimony of M. J. Holbrook.)

A. In the Alta Kolstad, no, I retained that in one unit.

Q. I am sorry, in the joint land.

A. In the joint land I did.

Q. Did you assign any difference in value because the land was broken into those two units?

A. Yes, I did.

Q. What was the difference?

A. On that area south of the river, the plowed land prior to the taking when it was a totally contained unit, it was my opinion that the value was approximately \$115 an acre, while after the taking, because of the separation and all of the soil being in a lighter and sandier area, it was worth only \$100 per acre. The tillable land, as an entire unit, I estimated its value to be approximately \$76 per acre before the taking and \$65 after the [319] taking.

Q. For the same reasons?

A. For the same reasons, yes.

Q. What about the grazing land?

A. I estimated the value of the grazing land before the taking at \$25 per acre, and after at \$5 per acre. That, however, is for a different reason.

Q. What is that reason?

A. The remaining amount of grazing land is insufficient to be an economic unit, and also the land is now held from water, so there is no water for the cattle.

Q. And so far as the grazing land is concerned,



(Testimony of M. J. Holbrook.)

did you apply that same reasoning to the other two units, the Alta Kolstad and Clarence Kolstad lands?

A. Yes, I did.

Q. Your after value is reduced to \$5 per acre in each case?

A. In each of the three units, I have reduced it to \$5.00, not because it has a use for grazing, but because it has a value for holding the entire property together.

Q. It no longer has value for grazing?

A. In my opinion, no.

Q. Why has it no use for grazing?

A. Basically because of lack of water, and secondly because of lack of size.

Mr. Schiltz: You may cross-examine. [320]

### Cross-Examination

By Mr. Galles:

Q. Mr. Holbrook, you said that you looked at aerial photographs in assisting you in arriving at your conclusion, is that right? A. Yes.

Q. What was the date on the aerial photograph which you looked at?

A. I looked at several sets of aerial photographs, including those which had been entered as exhibits in the prior trial at Glasgow, those in the Soil Conservation office, and some of those in the Assessor's Office. I can't tell you what the exact dates were, I don't know.

Q. Did you assist in the preparation of Exhibits 7 and 5, and I believe 10?

(Testimony of M. J. Holbrook.)

A. Yes, I have so testified.

Q. And were they prepared on the same scale as the aerial photographs, is that the reason they happen to be four inches to the mile?

A. I believe the aerial photographs were 1 to 200,000. There is a variability on those. These maps were made finally from a much smaller scale map and in turn blown up.

The Court: I take it, Mr. Holbrook, that from an examination of those photographs, you could tell what kind of land was involved in the pictures, is that so? [321]

A. It would be indicative of the type of land, it would not be conclusive necessarily. It would take more evidence than that before you could tell exactly. I examined, among other things, soil maps, topographical maps, actual photographs of the property, production and crop records. I consider things of that nature. Having considered all those, I could arrive at a conclusion of what the lands were like.

Q. (By Mr. Galles): Your conclusion was the lands were of the type and character pictured on Exhibits 5, 7 and 10, is that right?

A. That's right.

Q. I don't know exactly what aerial photographs you were referring to as introduced in the case in Glasgow.

A. They were United States Department of Agriculture pictures.

(Testimony of M. J. Holbrook.)

Q. That wasn't of this particular land, though, was it?

A. It was of this entire area, and also some areas bordering. Obviously, when you take an aerial photograph, you are not going to be able to focus on just the boundaries of one property. It included particularly the Kolstad properties, but in addition those which bordered.

Q. Now, I have before me an aerial photograph, and you stated you flew over this area last what, last fall?

A. Yes, that is correct.

Q. Just a month ago? [322]

I wonder if by looking at this prospective exhibit, I will say, you could say if this accurately portrays the land that you flew over except that portion that was covered by water? I will give you the opportunity to look if you think you can.

Mr. Wiggenhorn: Just a minute. The thing you have referred to as an aerial photograph here is in no manner identified here.

The Court: It should be marked before questioning the witness.

Mr. Galles: I thought if he said he couldn't, I wouldn't have it marked. I thought if he said, "No," I would put it aside.

Q. The aerial photograph has been marked Plaintiff's Exhibit 21, and I will try and hold it so that you may——

A. Now, what was your question?

Q. If the lands depicted in this exhibit appear the same, or represent what it purports to rep-

(Testimony of M. J. Holbrook.)

resent, that is, the tract of Clarence Kolstad, as you checked it when you flew over it as you have testified?

A. May I ask some questions to assist me in arriving at that answer? I would like to know at what altitude these were taken; I would like to know at what scale it is; I would like to know at what time it was taken, because it makes some difference to me, and further, I would like to [323] compare it against the map which I assisted in preparing. Then, I could answer you.

Q. I don't know myself. I have a witness here who does know that, but can you answer my question and state whether or not this appears to be the same as when you flew over it? If you flew at a different altitude, I would assume your answer would be no.

A. Your assumption is incorrect. It appears to be similar. Whether it is the same or not, I couldn't tell without the identification.

Q. You haven't seen this aerial or the aerials produced from the same negatives in working on your appraisal?

A. I may have, I don't know. I have no way of identifying this because it carries no legend, no scale, no time or nothing. I may or may not. It is just a picture as it stands. I can't tell whether I have ever seen it before.

Q. If I were able to give you the data on it—well, in fact, I will, and you can perhaps tell whether this is one you used.



(Testimony of M. J. Holbrook.)

A. It would be better if I compared the two, then I could give you an exact answer.

Q. First of all, I will say this is an official Bureau of Reclamation photograph. Have you seen any of those?

A. No, I have relied upon the United States Department of Agriculture. [324]

Q. That is all right; I think that answers it. You may not have seen this one.

A. I still may have seen it because I have seen a number of them, but the greatest number I have seen were from the Department of Agriculture.

Q. Mr. Holbrook, I want you to look at this aerial while I tell you some of the details of it, as we are prepared to have shown. I have said this is an official Bureau of Reclamation Aerial Photograph, or a series of them put together to form what you might call a mosaic, and it was taken on November 4, 1953, between the hours of 10:30 a.m. and 1:44 p.m., at 8100 feet above sea level, or about 5,000 feet above the ground; that it was taken from a Fairchild Cartographic Air Camera, contact prints—these are contact prints of the original negative on aerialgraphic Kodak film—

Mr. Wiggenhorn: I dislike to interrupt counsel, but may I suggest this is a statement of facts here by counsel which he might assume probably in the nature of his question, but it is not testimony, certainly.

The Court: That's right, assuming the things



(Testimony of M. J. Holbrook.)

counsel has said to be true, then go ahead and ask the question.

Q. Assuming what I have said to be true, and in view of the fact you said you flew over this and inspected the ground from the air, can you say that this accurately portrays the property of Clarence A. Kolstad? [325]

A. At what angle was the picture taken?

Q. Well, I will look further, I need some assistance on that, vertical?

A. Absolutely vertical at right angles, I don't believe so.

Q. I don't believe so—within four degrees of absolute vertical.

A. On all portions?

Q. Yes.

A. It was blown up from what scale, which might cause distortions?

Q. These are contact prints.

A. You have blown it up how many times?

Q. No enlargement.

A. Your question?

Mr. Galles: Read my question, Mr. Reporter. I think I can save time that way.

(Question read by the Reporter as follows:

“Question: Assuming what I have said to be true, and in view of the fact you said you flew over this and inspected the ground from the air, can you say that this accurately portrays the property of Clarence A. Kolstad?”)

A. No, I cannot say it accurately portrays it. I

(Testimony of M. J. Holbrook.)

can say it is very similar to other photographs which I have examined and it is similar to my impression of that particular [326] area.

Q. Then, for the purpose of showing the breaks and the general contour of the land, and eliminating the purpose of this photograph to show the exact fields as of the date of taking, excluding that accuracy, does it portray what you viewed when you flew over it?

A. It portrays what I viewed, but not what you said. It portrays the breaks, but it does not portray the various elevations or terrain. It distorts the view of that. You have no way of relating from the river bottom through the breaks to the bench. You have no way of relating the general contour of the fields. You have a distorted view of the property. It does relate where the breaks lie, it relates the general land outlook, yes.

Q. It does that which you have stated accurately, or at least as you saw it?

A. I don't know whether it is accurate or not, I haven't had an opportunity to examine it sufficiently, but it is similar, yes, sir.

Q. Oh, I want to point out that the little portion on the left hand side is not relative in distance from the main portion because it has to be over another two miles.

A. That is a part of what distorts it to me. It is out of proportion.

Q. This half section should be over another, roughly, a foot [327] or 15 inches?

(Testimony of M. J. Holbrook.)

A. Yes, which makes the relationship different, or difficult to observe on a casual observation. That is one of the reasons why it isn't correct.

Q. Mr. Holbrook, do aerial photographs make the whole country look flatter than it is in reality? I believe you stated you couldn't tell terrain or elevations or the slope of the ground.

A. You can tell the general characteristics of the terrain, yes, other than the topography, according to the angle from which the picture is taken. It will have various gradations as to what will be shown in the way of elevation. This particular one, being taken four degrees from vertical, tends to make it look like a pancake.

Q. Like a pancake means it levels out the slopes and hills is in effect what you are saying?

A. Yes, it distorts the view as you would see it by eye as opposed to by photograph. Seeing it by eye, you have a chance to measure against different things and will have a chance to notice what the different degrees in elevation are.

Q. Referring to Defendants' Exhibit No. 10, being the plat of the joint ownership, there appears some cross-hatching, which I think Mr. Kolstad stated to us was roughly the area within the elevation of 2980 feet. Did you assist in putting on that portion of this exhibit, or having it done under your [328] direction?

A. Yes, partially under my direction. The schematic drawing which you see was prepared by a local engineer here in Havre.

(Testimony of M. J. Holbrook.)

Q. How much water was on this property at the time you flew over it and viewed it from the air, and at the time you inspected it from the land itself?      A. Quite a lot.

Q. How many acres out of this joint ownership?

A. It would not be as great as the amount of taking because the total capacity of the reservoir had not been reached, so there was some lands which were not covered by water. In my consideration, I considered the entire portion of the property to be flooded, or to the taking line, whichever the case might be. It was the same one way or the other. The land was gone.

Q. When you say you consider the entire taking area to be flooded because it was gone, does that mean you didn't inspect any of the taken land that was not flooded when you saw it when you viewed the premises?

A. Yes, sir, I did, I even looked at the lake.

Q. I must have misunderstood you.

A. No, when you are on ground as an appraiser and trying to be observant, you will look at everything you can see, not only the property you are on, but adjoining property, and [329] all the things you think may happen, things you could anticipate may occur, so I saw the water and the extent of the flooding at that time, but insofar as giving it consideration in arriving at the before and after value, I considered that all of the land within the taking area was gone, whether it was covered by water, or whether it was taken as excess land by



(Testimony of M. J. Holbrook.)

the government to protect against eventual flooding and peak floods. Insofar as my determination of the lands which were covered in order to arrive at what I considered their highest and best use to be, I then had the benefit of photographs and related that to my observation of the terrain. I had production records, I had soil maps and topographic maps, and with these things, I could picture what had actually happened in the area which was under water.

Q. And, of course, the information that was furnished you, you assumed to be true because you did not obtain it of your own first hand information?

A. You make no such assumption in an appraisal until such time as you can arrive at an opinion based upon fact. You must weigh all of the evidence as to its validity. Some of the things I heard obviously weren't true, some of them I found to be conservative, but in the main, after having seen all of the things that I did, then I could arrive at an opinion of my own, which I did.

Q. Specifically, the number of acres of cultivated bottom [330] lands, of course, you had no way of determining that except what somebody told you?

A. That is incorrect.

Q. You found out from independent means?

A. All of my means were independent. The basis upon which I found it out was I had the benefit of accurate and good aerial photographs which clearly delineated what areas were hay; I had the



(Testimony of M. J. Holbrook.)

benefit of the exhibits of the previous trial; I had the benefit of the information in the Allotment Office; I had the benefit of information in two Assessors' offices; I had actual photographs taken on the property, eye level photographs as you or I would see them on the ground, so combining all those things, you can then arrive at an opinion, yes.

Q. You can make a pretty fair guess about what kind of land was there then without actually having seen it?

A. Yes, that is being done constantly. Many appraisals are made retroactive where land is covered by water or cities are built on farms. It is common practice provided you have sufficient information, and I certainly had a wealth of it in this case.

Q. When we consider good appraisal practices, however, if you have the choice of viewing the property before it is flooded as against waiting until after a good many acres have been flooded, the first is preferable, isn't it? [331]

A. I would say that is the easiest because then you rely upon your eye, which can be inaccurate. Going about it as I did, which can be the hard way, I had to prove out each step because I had never seen it. I think the method by which I arrived at the highest and best use was probably more accurate because it demanded more work.

Q. Did you see photographs. by that I mean sur-

(Testimony of M. J. Holbrook.)

face photographs—let me put it this way: What surface photographs did you see?

A. They were just occasional snapshots that happened to have been taken. It was part of the check of all the information that was put together. Several aerals were part of it, soil maps were part of it, topographical maps were part of it, production records were part of it, information within the Allotment Office was part of it. All of it had to fit together, each bearing upon the other, so you could fill out the whole.

Q. And, of course, you don't even suggest, I assume, that you saw snapshots of each and every part of this land that is now flooded?

A. Oh, certainly not, no, no.

Q. Did you see these photographs that have been introduced in evidence here?

A. Yes, I have seen them.

Q. And you used that along with the other information? [332]

A. Just as part of it, yes. It is only a part of the whole picture. It takes many things to arrive at an opinion.

Q. You don't know what the dates of the aerial photographs were that you used? I know there are some in existence by the Department of Agriculture that are 1941 aerals.

A. I have those photographs in my room, and I could determine that for you, but I can't remember it at this time, I am sorry, but I have that information in my room, and all of the aerals.

(Testimony of M. J. Holbrook.)

Q. Isn't it material or important whether an aerial photograph is taken 15 or 14 years before the date of taking, or within the last couple of years?

A. Yes, providing that was all you were relying upon, but that was only part of it.

Q. You had to determine how much weight to give the aerial photographs you did use, and part of that determination would be the date upon which they were taken?

A. Yes, it would be part of the consideration.

Q. Have you forgotten the date of the photographs, or don't you know whether you ever acquired it?

A. With the mass of information I collected, I have forgotten. I can get it for you, however, because I have the photographs.

Q. I noticed when you were qualifying that you stated you had never, at least I got the impression that you hadn't made [333] an appraisal in Montana before.

A. No, I stated in qualifying that I had done the bulk of my work in other states. I didn't state whether I had or had not done work in Montana before.

Q. But the bulk of your work has been in other states rather than Montana?

A. I consider my work is in the United States, Canada and Hawaii. I have not received the assignments in number from Montana that I have from other areas, that is correct. There is less work to do over here.

(Testimony of M. J. Holbrook.)

Q. What kind of a farm do you have? That surprised me that you were a farmer.

A. I guess I got to thank my grandfather for that. He homesteaded a section, and being one of his grandchildren, I ended up with part of it. It comprises 640 acres less that part taken by a county road, state highway, railroad, Bonneville Power, and such other things as impose themselves upon land, and it has operated up until recent years as a dairy operation on which we milk Shorthorn dairy cattle.

Q. What did you determine in this area to be the value of an animal unit?

A. I didn't arrive at a firm determination for the reason that most of this area is devoted to wheat raising. I have utilized in my work \$250 as the value of an animal unit, which is the minimum, in my opinion, of the market at the time. [334]

Q. Now, how does the value of an animal unit relate to the value of a cow?

A. It doesn't, it relates to the value of a steer, generally. It relates to the value of a steer, and there is an old archaic or old fashioned rule of thumb which says whatever the price of a steer is on the market, that that is the value of the animal unit. That is highly fallacious, the reason being it was based on a 1,000 pound steer. The bulk of the market today is smaller animals because of pre-packaging and smaller cuts, so the old rule of thumb is purely a rule of thumb. It is indicative, but it isn't being used as conclusive. It is just like a per-



(Testimony of M. J. Holbrook.)

son who would fire a shotgun rather than a rifle. It will cover, but not be right to the target.

Q. You will not say the value of a cow has no relation to the value of the animal unit?

A. Your question was incorrect. It isn't based on a cow, it is based on a steer. It is based upon a 1,000 pound steer and doesn't hold true any more.

Q. I guess it is immaterial, but I don't understand what the difference is between a 1,000 pound cow and a 1,000 pound steer, insofar as relating to forage and what they would eat.

A. There is a great deal of difference—insofar as what they would eat, yes. Insofar as the market is concerned, the steer will sell for more than the cow. I don't believe you [335] would order cow if you had the choice of steer. You don't use a poor thing, regardless of what it is, to determine market value. In determining animal unit value as it relates to the price of a cow, you are using some broad rules of thumb which are highly inadequate.

Q. Yes, but I want the jury here to find out just how the animal unit value in a cattle operation is computed in this matter because you did mention grazing and animal units.

A. Well, the accurate way to determine it, in my opinion, is to find sales of comparable properties, determine the carrying capacity of that property, divide it by the number of animal units which it would carry, which will then give you the animal unit value.



(Testimony of M. J. Holbrook.)

Q. And did you determine what the carrying capacity of this general area is or was?

A. Yes, the general area, and also the specific areas of each of the three farms.

Q. And what is that?

A. In my opinion, the carrying capacity of the Clarence Kolstad place is 165.

Q. Now, that was broken down to an average of how many acres per animal unit?

A. It is broken down to the average of the different acreages. Each type of acreage would carry a different amount. I carried it basically on this basis: I carried it [336] on the basis of one animal to 30 acres in the out and out grazing; I carried it on the basis of one to 15 in the bottoms; I carried it on the basis of—I have forgotten exactly now, but I think it was about one to 3.3 in the alfalfa; I carried it on the basis of one to 40 in the crop land, so then the composite of each of those units as broken down added back together gave me 165 animal units for the Clarence Kolstad place, which, at \$250 an animal unit is \$41,250, as opposed to the \$35,900 which I placed on it for grazing, and I used the minimum animal unit value.

Q. You say the best test of market value is comparable sales?

A. No, I don't say that, I say it is a test. It takes more than just comparable sales.

Q. Now, in going to appraisal practices, that is one of the best tests, isn't it, what similar land in the area is selling for?

(Testimony of M. J. Holbrook.)

A. It is one of the best tests. The income approach is one of the best, and the cost or summation test is one of the best tests. It is dependent upon the quality and quantity of the information you can get; it is dependent upon what you are trying to find; it is dependent upon all of those factors, so any one approach by itself is not necessarily the best approach. It may be better under some circumstances.

Q. Well, now, when you say cost or summation approach, that [337] means in effect what Mr. Kolstad was doing, taking so much of a certain type of land at so much an acre, and he finally adds up the various classifications and comes to a total?

A. That is not my opinion of the summation approach. My opinion of the summation approach is the determination of the value of the land by comparison in the market, or by the income approach, plus the depreciated value of all improvements.

Q. Well, then, maybe I don't understand. There are three methods you have mentioned of arriving at fair market value, and I thought you said the cost or summation approach was one?

A. That is correct.

Q. All right, now, what goes into that approach?

A. Your cost or summation approach is the value of the land established by comparison in the market place, or by the income approach, plus the depreciated value of the improvements, if any. That is where the word "summation" comes from. You add the value of the land to the value of the im-

(Testimony of M. J. Holbrook.)

provements. That is what "summation" means in that approach.

Q. The second method is market approach?

A. It could be, there is no set order for them.

Q. You have already mentioned the market approach and summation approach——

A. You will find no clear cut distinction between all of [338] them because all an appraisal is is a matter of comparison. Your clear lines of distinction are based upon the tools you use to process your information.

Q. Is this a fair statement, Mr. Holbrook, that the cost approach, that is what it costs to get the various component parts of the whole? Is that a fair definition of the cost approach?

A. Well, I would interpret it far differently than you do—yes, it is a fair definition. I would however prefer the definition that the cost approach is based upon the value of land, established from comparison or through the income approach plus the depreciated value of improvements. I would say that was a fair definition.

Q. I understood the income approach was another entirely different and separate approach?

A. Well, as I stated before, they are all alike and overlap in places, but it is a third method, yes.

Q. So there are three approaches, whether you use them all at once or separately or as checks, the cost, the income, and the market?

A. I am afraid I haven't explained it very clearly to you because you don't use them all at

(Testimony of M. J. Holbrook.)

once. You do use them as a check against one another. What I was trying to explain to you is there is an overlap of information utilized in each one of the three. They are three separate and distinct [339] steps.

Q. Now, in the income approach, did you use that as a check in this case? A. Yes, I did.

Q. And did you use 22 bushels to the seeded acre as the average? A. No, I did not.

Q. What did you use? A. 21 bushels.

Q. 21 bushels?

A. Yes, and I also checked it against 24 bushels.

Q. You, of course, divided that by two to get the income from the cultivated acres?

A. Well, yes, because of summer fallowing, if that is what you mean.

Q. Yes, that is what I mean. So you get  $11\frac{1}{2}$  bushels that is taken from—that is attributable to all of the land, even though it comes from just half of it? A. Yes.

Mr. Schiltz: Your arithmetic is a little off.  $11\frac{1}{2}$  bushels would be 23.

Q. Ten and a half, I am sorry. How much of the  $10\frac{1}{2}$  bushels do you attribute to the land?

A. One-third.

Q. What is one-third of  $10\frac{1}{2}$ ?

A. Well, 3.50, roughly. It isn't quite that much because [340] one-third of 10 is 3.33, and one-third of a half is .16, so it would be 3.50.

Q. It is exactly 3.50. All right, how much do you



(Testimony of M. J. Holbrook.)

have to deduct from that third as chargeable to the land?      A. Taxes.

Q. Any thing else?

A. No, there is no other charge to it, this is pure rent.

Q. What are the taxes?

A. I utilized the figure of 25 cents an acre, although I found that varied in this land from eight cents to 31 cents. I kept it on the heavy side, over and above the actual taxes, anticipating that they would go higher in the future.

Q. What figure did you use in your deductions?

A. Twenty-five cents.

Q. Isn't the land owner entitled to, say, some mileage, to go out and view the premises as farmed by the tenant, assuming he owns it as an investment?

A. I don't see where that has anything to do with the land value.

Q. So, you come out with \$3.25 an acre of the cultivated acres that the land earns?

A. Well, according to your calculations, yes, it would be \$3.50 less 25 cents for taxes would be \$3.25.

Mr. Schiltz: I think there is some confusion here—— [341]

The Court: Maybe you are confused, but maybe they are not, and if the witness can answer the question, he will answer, so apparently he is not confused.

Mr. Schiltz: I am confused.



(Testimony of M. J. Holbrook.)

The Court: Continue. Don't interrupt counsel.

Q. Let's see, what do you come out with then as the net return of the land?

A. Well, under your problem, I have been running it in my mind, I think it is \$3.25, but I don't know, because we are working your problem, not mine.

Q. I want it related to this land. I am not giving you a hypothetical case.

A. You were.

Q. I think counsel is right, I got mixed up. You used 21 bushels?

A. Let me get my actual computations.

Q. Twenty-one bushels yield is not hypothetical, is it, Mr. Holbrook?

A. No, 21 is what I told you I used, 21 and 24.

Q. What do you mean by that answer, you used 21 and 24?

A. Just that, I used 21 bushels on one basis and 24 on another.

Q. You mean on different land?

A. The same land. I didn't say I utilized this as conclusive evidence. I said I used it as a [342] check.

Q. All right, that is what I want to know. I don't want hypothetical questions. We want to find out just the information you used.

A. I don't ask the questions, you do.

Q. All right, now under what conditions—what is the 24 bushels to the acre?

A. That was my opinion in checking the poten-

(Testimony of M. J. Holbrook.)

tiality of this particular area and the land because the crop history has indicated that the yield per acre has been continuously increasing, and it has increased as the moisture depth has penetrated into the soil due to the summer fallowing and good agricultural practices, so that where 10 or 12 years ago you had a yield of 14 or 15 bushels per acre, today you have a yield of 19 or 20 bushels per acre. You can anticipate all things being equal, that should continue to increase to some degree. That has been the history in all this particular area, and it is evidenced by the crop history. There are some things which will cause increased yields for specific years. If you have more moisture in certain years than others, the tendency is to have a greater crop, but this land is becoming richer in production continuously due to summer fallowing and good agricultural practices, so I tested it on 24 bushels to see what might be anticipated in the future.

Q. That would be speculative?

A. No, because this land has produced as high as 40 bushels [343] under certain conditions.

Q. That was in years when they had good rainfall during the growing season?

A. That's right. The general tendency of the land, however, is an increase in production is what I am trying to say, which the production records made available to me indicated. Those records indicated 22 bushels to the acre. I do have every reason to anticipate, historically, however, that will in-

(Testimony of M. J. Holbrook.)

crease again. I didn't use 24 as being my figure. It was one of several which I used.

Q. What did you say was the minimum rainfall during the growing season that is required to raise the average crop?

A. I didn't say during the growing season.

Q. Do you have an opinion on that?

A. The minimum rainfall for crop certainty is nine inches. At eight inches it is beginning to become probable. I would say you have got to have at least five to six inches at the most critical times of growing, and you would be at that getting down to the marginal level.

Q. This morning you mentioned some amount of rainfall during the growing season. Do you recall what that was?

A. I don't recall, no, sir.

The Court: Court will stand in recess until 20 minutes after 3.

(Jury admonished.)

(10-minute recess.) [344]

Q. As I recall, you said this morning that it required a minimum of 8 and 9 inches of rainfall, mostly during the growing season, to sustain the averages you consider to be proper?

A. I believe that statement is essentially correct. I said 8 to 9, not eight and nine, of which the bulk of it would have to fall during the crop growing season.

Q. By bulk of it, do you mean all but one or two inches or 60 per cent of it?

(Testimony of M. J. Holbrook.)

A. Well, what kind of crop do you want?

Q. Winter wheat.

A. I have said the minimum, which I set at 5 to 6 inches, would be, in my opinion, at a point beyond which it would be highly speculative. If you ever got a crop, obviously, the more you could get in that period, the greater production, other things being equal.

Q. Now, in 1949, according to the Joplin weather station, and I assume you checked the rainfall at the Joplin weather station?

A. Yes, I did.

Q. Do you have those figures with you?

A. I have them among my notes.

Q. Well, according to my information in 1949, there was 5.95 inches during the growing season, with a total of 8.2 inches for the whole year. [345]

A. That is the Joplin area. The Joplin area is not the Chester area. There could be a tremendous amount of difference in rainfall. The difference between rainfall between Shelby and Dunkirk is a couple inches, and the same thing can happen over at Joplin, so the rainfall at Joplin, I don't accept as being the fact at Chester. If you are trying to draw some comparisons, give me the rainfall at Chester, and I could give you a conclusion.

Q. Do you have that? A. No one does.

Q. It could be less than this one or more?

A. If you would go on precedent, what has happened, you would find it was more, but it could happen it was less, I don't know.



(Testimony of M. J. Holbrook.)

Q. Well, now, assuming that the average production in 1949 from these lands involved here was, and I will state that a witness will come on that will verify this—was 12 bushels to the acre, harvested acre, that would indicate that it was a fairly low year of rainfall during the growing season, wouldn't it? A. Not necessarily.

Q. It wouldn't?

A. No. You would look to that, yes, but it might also be newly broken land which would have very low production; it might be hail hit and took out part of the crop; it could have [346] been a fire in the area. There are a whole lot of things you could look for that can reduce your yield besides rainfall.

Q. In 1952, Joplin shows 5.48 inches during the growing season, and that year, the tenant on these particular lands, and assuming he will testify the yield was an average of 13 bushels to the acre, so generally there is in these particular years a definite comparison between the rainfall reported at the Joplin station as being low, and the production obtained from these lands?

A. Of a particular farm?

Q. Yes, these lands.

A. You are absolutely wrong. If you are going to hang your hat on a conclusion such as that, you are making a mistake, a bad mistake. If hail had come and taken out half of the crop after you had come up with 10 bushels, you would be wrong. There are too many factors could reduce the crop. I don't know how much hail, I don't



(Testimony of M. J. Holbrook.)

know how new the land was, I don't know if there was that amount of rain at Chester, the same amount as there was at Joplin, I don't know the difference in yield, with the result you are building up with a completely falacious line of reasoning. I don't think it has——

Q. It has no bearing on it?

A. Yes, it has a bearing like one finger is part of my hand. I can't give it any more weight than that. [347]

Q. You think it has very little relationship, the fact there was low rainfall in 1949 and 1952 at Joplin in connection with the low yield from these lands?

A. It is indicative, it would lead you to take a look at what happened. After you have limited all the other things like hail, summer fallow, new land, what kind of seed, after all of that is eliminated, I would agree with you, but it is only one of a number of things to consider. You can't say one note makes a song.

Q. You mentioned new land. I assume you believe new land affects productivity?

A. Of what?

Q. Of wheat from that land, from the new land?

A. Yes, that is correct.

Q. For a few years? A. That is correct.

Q. And after that it is better than land that is old land?

A. I don't know that I agree with that.

Q. You think the land doesn't build up in its

(Testimony of M. J. Holbrook.)

production right after it has been planted for a few years and then stay relatively level and then after 20 or 30 or 50 years lower in production, assuming no artificial fertilizers are applied to it?

A. That is a very generalized statement. Insofar as dry land farming in the Chester area is concerned, it is my [348] opinion the productivity will continue to increase with proper farming practices because of summer fallowing, which is primarily to get humus and moisture into the earth. The moisture will keep getting deeper and deeper and deeper with the result that in the early years in which you assume you have the greatest soil content and would get the greatest crops, you don't have as much moisture. Actually, your crop will continue to go up. When you hit a year of lower rainfall with more moisture in the ground, you can weather those periods.

Q. For how many years of low rainfall?

A. Well, how much water in the ground? Everything is relative. You can't reach up in the sky and say how much it will endure without qualifying it.

Q. All right. Suppose now we have 10 or 11 feet—10 or 11 inches of rainfall during the growing season for the last five years—except for—say four years before last year. Last year it was reduced to about eight inches, and suppose next year and for the next four years, it is from five to six inches during the growing season. Now, will that productivity of the land in the Chester area and particu-

(Testimony of M. J. Holbrook.)

larly these lands be affected by that lack of moisture?

A. Yes, there would be that tendency. You have missed my point, however. In the older lands that have built up a greater amount of moisture, more than the newer lands, their [349] ability to carry through the lesser years is better than lands that hasn't built up a greater amount of moisture, so while the production average might go down, the level of production will be better on the older land which has stored up more moisture than it will on the newer land which hasn't the moisture stored in it. Therefore, older land which has stored moisture under proper farming practices in this area can be much better land than newer broken land. That is why new land in the first year, unless other conditions intervene, won't have the yield. It hasn't the moisture, you don't have the organic material within the soil; you haven't built up nitrogen in it, you haven't built bacteria into it. There are a lot of other factors.

Q. Do you know how much of these three parcels is newly broken land?

A. Well, from 1910, all of it.

Q. All right, from 1947?

A. No, I don't know, except from the maps. The most accurate thing I have is the breakdown as of the date of taking.

Q. Do you know how much had been broken since 1947—excuse me—strike that, please. On the date of taking, do you know how much land had

(Testimony of M. J. Holbrook.)

been broken since 1947?           A. No.

Q. In these three parcels? [350]           A. No.

Q. Would that affect your opinion, if considerable had been recently broken?

A. It would if I didn't have production records, which I did. The production records answered that question for me.

The Court: Let me ask you, does your answer mean that if land had been broken just within the last five years that its value on the market is less than land that has been broken for 10 or 15 years?

A. Not necessarily, sir, freshly broken land will not normally produce as good crop as older land will.

The Court: Immediately?

A. But it has the same potentiality.

The Court: So it has approximately the same market value?

A. That is correct. When you value a farm, you value the whole farm. You don't say, "That is 100 acres, and these are this," a farm is bought and sold on the average per acre.

Q. (By Mr. Galles): But newly broken land the next few years, if they were drought years as is happening in Kansas and Texas, it would definitely be shown in the production that they weren't as valuable lands from the production standpoint, as compared to the old land which would have that reservoir of moisture?

A. I didn't say that. [351]



(Testimony of M. J. Holbrook.)

Q. I am saying it. I want to know if you agree?

A. No, I don't. Texas is primarily ranch land, and the problem is different than with wheat. Kansas is corn and wheat. Kansas is not all dry land farming. This is all dry. The practices and accumulation of rainfall will be different here than in Kansas and Texas.

Q. Is Kansas all ranch land or farm land?

A. It is all farm land.

Q. Farm land, and they are having trouble there because of drought in the last few years?

A. They grow wheat, corn and other products, but it is not land you can compare to this.

Q. You said you looked at 100 sales and discarded what, practically all of them? A. Yes.

Q. How many did you give weight to?

A. Three.

Q. And was one of those the sale from Kelly Kolstad to Louise Ray that was offered this morning?

A. Yes, I talked to the principals in that. I also examined the farm.

Q. And you gave it weight. Did you give it complete weight or use the same per acre value in applying it to this land, after talking to the parties and considering the fact that that contract wasn't carried out? [352]

A. I think that is rather obvious from what I testified to. That was approximately \$133 an acre across the board. I have come in at \$82, \$72.50 and \$56 across the board.



(Testimony of M. J. Holbrook.)

Q. Across the board. When you have all but 20 acres that is cultivated and if it is nicely blocked out, why that is practically saying what the value of cultivated land is, isn't it?

A. No, not to me in this case because I don't consider that land was as good land as this. It doesn't have the history of production which is as good; its soil tends to clay; it is winter wheat now, but it could very easily—it is marginal, and it could be into spring wheat. Therefore, I don't think it has as great a value as do the Kolstad properties. There were also improvements on that property which you would consider.

Q. All of which has to be taken away from the total price in order to find out what the value of the land is?

A. They are weighed and balanced and considered, yes.

Q. Yes, as I have it in my notes, in that particular sale, you considered there was 1,880 acres, out of which only 20 or 30 acres were not cultivated?

A. Yes. As a matter of fact, I didn't even think there was as much as that not cultivated. My general thinking of it was it had more cultivated acreage and was well blocked.

Q. You mention that was a well-blocked farm, that is, the [353] shape of it was good, practically rectangular?

A. I would say it was good, but it doesn't com-

(Testimony of M. J. Holbrook.)

pare with the Kolstad property because of the difference in size and difference in soil.

Q. You think the shape of the fields in the Kolstad properties is as good as a rectangular piece of property 1880 acres large like the Kelly Kolstad property?

A. I can pull an 1,880-acre field out of the Kolstad properties and say, "Here is the equivalent." They have more than that. The blocking in the Kolstad property isn't ideal by any means, but it is good. It has got problems like any other ranch does.

Q. How many appraisals have you made in Montana other than this one? A. Two.

Q. Farm lands? A. One.

Q. What locality? A. Highwood.

Q. Around Great Falls?

A. Yes, about 35 miles out of Great Falls.

Q. That is one of the best wheat land areas in the state?

A. Part of it is wheat land; part of it is cattle also.

Q. How large a place?

A. I don't recall, about 35 or 36 hundred acres.

Q. When did you make that appraisal?

A. About three years ago.

Mr. Galles: That is all.

Mr. Schiltz: No questions.

The Court: I wonder, Mr. Holbrook—you were shown an aerial map marked Exhibit what?

The Clerk: Twenty-one, your Honor.

(Testimony of M. J. Holbrook.)

The Court: Can you read that map, that aerial map?

A. I can recognize it, your Honor, but you can't read it accurately for a number of reasons. One of them is that it was cut on the boundaries so you can't relate it to the land which adjoins it. Land, of course, has continuity to it. You could get a good general indication, but I wouldn't go beyond that because it is too restricted and distorted. I could get something from it, yes.

The Court: Could you take that map and read it and relate it to the maps, Exhibits 5, 7 and 10?

A. Generally, yes.

The Court: Well, will you do that, point out on that map the land that is delineated on the exhibits?

A. This portion in here (indicating) on the aerial photo, which is a small portion attached to the right with the legend that it is approximately two miles away, which is not correct on this map, and outlined in the broken line, which means the remaining land, would be this area in here (indicating). [355] The Marias River is shown on the southerly boundary through here, this being a portion of the breaks, this a portion of the breaks. This bottom land in through here would relate itself to the river in through this area here, which is indicated as bottom land in here and tillable land in through here, and grazing land in these portions (indicating).

The Court: Now, referring to the map, the

(Testimony of M. J. Holbrook.)

aerial map, Exhibit 21, can you delineate those same types of land by reading that map?

A. Generally you can, your Honor. There is one problem. This was taken at an altitude and at a scale which makes it exceedingly difficult. If you were reading a soil map with it and a contour map with it, it would begin to come in. For instance, it is very obvious up in here (indicating), these are cultivated fields, and you know from being over the land that is all in wheat. You can readily identify it when you get in the breaks from having been in the breaks and around the breaks. You know generally what is growing in there. It is pasture land. When you get down in here, you can notice how it tends to level out, it shows a different coloration, which is indicative that you have got a different type of vegetation, you have got it different than, for instance, grazing land in here, so you know it must be bottom land. Then, it is kind of—whether it is bottom cultivated or not—not on Clarence's place, he didn't [356] have any cultivated bottom. On the other bottoms, it would show the areas which have been cultivated. Then, knowing the crops which are common to your bottom lands, you could select the area, and in order to determine the total area, if you knew the scale, you could run the planimeter on it and come up with the exact acres.

The Court: You can't make an exact reading on that map?

A. This map, no.

The Court: That is all I wanted to ask. If coun-



sel want to ask any additional questions, they are at liberty to do so. Mr. Galles, do you want to ask any further questions with reference to that?

Mr. Galles: This map, of course, is not offered for the purpose of showing acreage or the acreage in the various fields.

Mr. Wiggenhorn: It hasn't been offered at all, may I suggest.

The Court: It hasn't been offered at all. You used the map in cross-examining the witness. I wanted to bring out whatever further information was available.

Mr. Galles: No further questions.

The Court: Does counsel for the landowner wish to ask anything further?

Mr. Schiltz: No further questions.

(Witness excused.) [357]

### W. J. CARROTHERS

called as a witness on behalf of defendants, being first duly sworn, testified as follows:

#### Direct Examination

By Mr. Schiltz:

Q. For the record, will you state your name, please?      A. W. J. Carrothers.

Q. Where do you live, Mr. Carrothers?

A. Spokane, Washington.

Q. What is your occupation?

A. Real estate appraiser.

Q. Tell us something about your appraisal ex-



(Testimony of W. J. Carrothers.)

perience from the time you got into the appraisal profession?

A. Well, my first appraisal experience started in 1926, and from 1926 for approximately five years, I was employed by an appraisal company known as James J. Staffords and Associates, during which time we appraised the City and County of San Francisco, Alameda County and Vallejo in California, and the entire group of Hawaiian Islands for tax purposes.

Q. In this appraisal, were you appraising for fair market value in this type work?

A. Yes, we were appraising fair market value, from which the Assessor obtained his figures for equalization purposes, and this encompassed every type of real estate within the area [358] we were appraising.

Q. Will you continue, please, with your experience?

A. Subsequent to my completion—the last assignment I had with them was the Hawaiian Islands. Subsequent to the completion of that assignment, I returned to the mainland, and was the Assistant Division Appraiser for the Home Owners Loan Corporation in Northern California, appraising principally properties for resale, that is, properties which had been foreclosed, for resale to the general public, and subsequent to that I was a real estate broker and salesman in California, during which time I also did appraisal work. At the time just prior to the war, I was employed as Review Ap-

(Testimony of W. J. Carrothers.)

praiser in the Corps of Engineers, with the Corps of Engineers, in the Division Office at San Francisco. I appraised and reviewed appraisals during the acquisition period prior and during the early stages of the war in California, Utah, Washington, Oregon, Nevada and Arizona. Subsequent to that employment, I was employed for approximately three years with the Office of Price Administration Rent Control making studies of multiple rental units such as large hotels in the Western States, the large motels and that type of thing; and also made studies to determine the rent generally prevailing in those areas, which was determined largely by a matter of comparison and the actual rental history of these various properties and areas; and subsequent to that, I was the [359] Assistant Regional Appraiser and Regional Appraiser for the War Assets Administration for the western part of the United States, that is, the West Coast states, and we were during this time appraising for the market value, that is, to determine the market value of such things as shipyards, large industrial plants and so forth, for resale for substitute uses; in other words, to try to find a substitute use for these plants, as the use for which they were built no longer existed after the war emergency had passed. At the completion of that assignment, for approximately two and a half years, I was employed as an appraiser, principally—that is, by the Corps of Engineers—principally at McNary Dam where I appraised the entire Columbia Irriga-

(Testimony of W. J. Carrothers.)

tion District and a great many private ownerships, principally farm land and residential properties along the Columbia River.

Q. How many acres were involved in that appraisal, Mr. Carrothers?

A. That I couldn't say. There were approximately 5,000 ownerships under the McNary Dam, but as to the acreage, I haven't an accurate record of it.

Q. All right, go ahead.

A. I resigned my position with the Engineers in 1951, and since that I have had my own appraisal business, now headquartering out of Spokane, Washington. During these past, a little over five years, when I have been so employed, I [360] have appraised in the northwestern part of the United States, that is, Oregon, Washington, Idaho and Montana, and the territory of Alaska. My last assignment was the appraisal of the entire Alaska Communications System, and the appraisals in the other states that I have mentioned have been largely agricultural lands, with some suburban and urban lands, particularly in Spokane. During this period I have appraised wheat lands in Oregon, Washington, Idaho and Montana.

Q. Will you give us a representative list, without going into too much detail, of some of the clients for whom you have done appraisal work since you have been in your private business?

A. I have appraised for the Corps of Engineers, for the Alaska Communication Service, for the De-

(Testimony of W. J. Carrothers.)

partment of Justice, in Idaho, in Montana, and in Washington, and the State Highway commissions in Washington and Idaho and various individuals.

Q. Have you qualified as an expert appraiser in State and Federal Courts?

A. I have in the State and Federal Courts in Washington and the Federal Court in Idaho, the State Courts of California, and a Commission in Montana, a federal commission.

Q. Mr. Carrothers, did you have occasion to appraise lands in Toole and Liberty Counties because of the condemnation cases occasioned by the construction of the Tiber Dam? [361]

A. Yes, sir; I did.

Q. And how did you come to make those appraisals in Toole and Liberty Counties?

A. I made the appraisals in Toole and Liberty Counties at the request of the Department of Justice.

Q. How many acres did you appraise for the Justice Department in this area, do you have any idea?

A. I imagine approximately 17 or 18 thousand acres.

Q. How many different tracts? A. Nine.

Q. Among those tracts you appraised, were the lands of Clarence Kolstad and Alta Kolstad and the joint lands of Clarence and Alta Kolstad included?

A. Yes.

Q. Did you appraise them as three tracts?

A. I did not.

Q. You appraised them as one tract?

A. That is correct.



(Testimony of W. J. Carrothers.)

Q. In a minute, we will ask your opinion as to the individual tracts, but I want to get the background of how you went about appraising those lands. When did you come into the area?

A. I first came into the area in May, 1956.

Q. Let me ask you if the dam had begun to back up water at that time? [362]

A. Yes; it was. That was the reason I came in May. I made a special trip in order to try to see all I could before the property was flooded, although when I arrived, some property was flooded.

Q. What was the extent of the flooding?

A. Well, in the properties which I was asked to view, the lands, that is, the river bottom lands in the mouth of Willow Creek and up the creek a short distance, and up the Marias River to approximately three miles had been flooded as near as I could tell.

Q. When you came on the land in May of 1956, how did you go about appraising the lands?

A. I at that time merely made a field inspection of the land and viewed the land.

Q. Did you do that on foot?

A. No; I did it mostly by automobile, and by foot, yes, but the time was limited, and the purpose of this view was a general view which I took in company with representatives of the government.

Q. That was the extent of what you did in May, 1956? A. That is correct.

Q. Then did you return to the property and do something more?

A. Yes; in August, I returned.



(Testimony of W. J. Carrothers.)

Q. That is 1956? [363]

A. Yes; August of this year, and made my detailed appraisal study.

Q. What was the extent of the study you made, what information did you seek to find?

A. Well, first was to complete my inspection of the land in a more detailed manner, that was the first thing I did. Then I followed the normal appraisal practice of, in my own mind, determining what the highest and best use of these lands was; then I attempted to find all available data affecting market values within the immediate area, and to this end, I was furnished, of course, the legal descriptions and maps.

Q. Showing the various ownerships?

A. Showing the various ownerships, and maps of the area, both the immediate area and the immediately adjacent areas. I viewed aerial photographs and soil maps and other data pertaining to land uses, land types, topography and so forth. I had—it was made available to me which saved me considerable time—the sales in the two counties which I then analyzed, and——

Q. That is, sales of other lands?

A. Of other lands in the community within the past five-year period, I should have said. I inspected these lands to see if in my own mind I could use them or could not use them as comparable sales in attempting to make the usual analysis you do on comparable sales. [364]

(Testimony of W. J. Carrothers.)

Q. Which lands do you mean, the lands involved in the sales?

A. Yes; I inspected the lands involved in the sales.

Q. What did you find with regard to land values as reflected by the sales you examined?

A. I found in this area as in many of the other wheat areas that I have made studies of in the past two to three years that there are few, if any, desirable units on the market, and that there are few, if any, of the better producing lands being exchanged on the present market. This is due to the present situation, not only in this area, but in other wheat growing areas and the stability of the market, and the fact that during the past 10 years—it is pretty general in such areas—that production has increased considerably, some claiming that during the past 10 to 15 years, their production has doubled, and that has made this type of land and the owners of this type of land reluctant to sell.

Q. Did you find any trend in land values in this particular area?

A. I found a definite trend upward. In other words, sales up until the past two years or a little better show a markedly less per acre value than the more recent sales.

Q. Do you think—has there been any indication of a stabilization of land values in this area?

A. I think they are beginning to stabilize, if I may put it that way. [365]

Q. Had they stabilized as of May 24, 1955?

(Testimony of W. J. Carrothers.)

A. I don't believe they had; they were in the process, but they had not stabilized as reflected by the current sales.

Q. In your examination of this area in your efforts to determine fair market value of the lands in this area, did you take into consideration soil classification, rainfall, depth of soil, and that sort of thing? A. Yes; certainly.

Q. Did you find any difference between the lands south of the Marias River and those north of the Marias River?

A. Well, in this immediate area, the lands south-erly of the Marias River are lighter soils, and the lands to the north, particularly across the Great Northern Railroad, apparently are lower producing lands.

Q. What crops do they produce up there?

A. Spring wheat rather than winter wheat.

Q. And as you get further south from the Great Northern Railroad, you run into winter wheat country, is that right?

A. That's right. I saw some areas south of the Great Northern having a considerably higher clay content than the subject area, and they have a tendency to bake, which is not too good for winter wheat.

Q. Now, when you refer to the subject area, generally what area are you talking about?

A. Well, those lands that I was appraising adjacent to the [366] Tiber Reservoir.

(Testimony of W. J. Carrothers.)

Q. That would be the 11 ownerships to which you referred previously?

A. Yes; that is correct.

Q. Now, then, directing your attention to the Clarence Kolstad land, in the course of this appraisal, did you—let me ask you first how much time did you spend in this area altogether?

A. Well, altogether I have spent better than a month. This last time I have spent approximately two weeks in the field on the field examination.

Q. Now, then, referring to Clarence Kolstad's land, are you familiar with it?

A. Yes; I am.

Q. Did you inspect and examine and study his lands along with other lands? A. I did.

Q. That was one of the ownerships you were examining? A. I did.

Q. You are able to distinguish between Clarence's lands and Alta Kolstad's lands and the joint lands of Clarence and Alta Kolstad, are you not?

A. Yes.

Q. Have you appraised for Mr. Clarence Kolstad his lands for their fair market value as of May 24, 1955, before taking? [367] A. Yes.

Q. Now, how did you go about appraising those particular lands?

A. Well, the process is the same as for all of the others, the difference being that for this or any other particular land, and I did in this case, classify the lands according to a use classification.

Q. You had all your basic information for ap-



(Testimony of W. J. Carrothers.)

praising these lands, it was just a matter of breaking it down then into a use classification, is that right?

A. Well, I had the basic data, as I said, from a previous study I had made, but there are a considerable number of differences develop when you break any large area down into smaller portions.

Q. How many acres of land did you determine Mr. Clarence Kolstad had before the taking on May 24, 1955?      A. He had 5,180.7 acres.

Q. And out of those acres, how many of those acres were cultivated?

A. Well, there were 2,551 acres of cultivated land.

Q. Did you make a classification of tillable land?

A. That was one of my classifications, yes, sir.

Q. How many acres of those were tillable?

A. 840.2 I have.

Q. Then how many acres were bottom [368] land?      A. 580 acres.

Q. How many acres of grazing land?

A. 1,209.12.

Q. Now, are you familiar with the maps that have been used here to show the lands of Clarence and Alta Kolstad and their joint lands?

A. Yes.

Q. These figures you have given, are they in substantial agreement with the designations as shown on this exhibit of the Clarence Kolstad—

A. Let me say this: These classifications are my own classifications, but I find upon examination



(Testimony of W. J. Carrothers.)

of the map they are substantially in agreement with the classifications shown there.

Q. Now, then, after the taking on May 24, 1955, how many acres were left to Clarence Kolstad?

A. 1,400 acres.

Q. How did those acres classify by use?

A. They were the same classifications. I have broken them down a little differently. They are wheat land, tillable, grazing and so on.

Q. How do they break down?

A. 96.3 acres of wheat land in one category that I have, and 711.2 in another. Those are both wheat lands.

Q. Why do you break them down into two categories? [369]

A. Well, because, in my opinion, after the take, the residual value is less in one instance than the other.

Q. You can refer to the map if you like.

A. Well, may I step down to the map? I can point it out there. These areas were cultivated land (indicating). There is 96 acres——

Q. Excuse me a minute, Mr. Carrothers. You are now referring to Defendants' Exhibit 5, is that correct? A. Correct.

Q. Now, go ahead.

A. These, you will notice, are isolated small acreages of cultivated land, and those areas are 96.3 acres which I have in one category of wheat land. In my estimation, those small isolated fields after the taking are much less desirable on the market

(Testimony of W. J. Carrothers.)

than they would be if they were contiguous to the other fields and you wouldn't have to move your equipment a considerable distance from the other fields which may be cultivated. It tends to make it a more expensive operation, and in general makes it less desirable. I did not reduce the market value of the remainder as greatly because in my opinion you have larger fields and they are more economical to cultivate, and would be more desirable on the market to any prospective purchaser of this type land.

Q. Now, then, further breaking down the remaining lands, how did you classify it, how many acres? [370]

A. If you will notice, there are two 40's south of the river. I think they can be seen. They are the only ones south of the river, and these small fields—mostly they are tillable lands, although at the present time, or at the time of taking, they were not cultivated, but those acres on that side of the river, in my estimation, have a low marketability due to their lack of size and isolation from other lands of the same ownership.

Q. As they now stand after the taking?

A. Yes; we are speaking now of the lands after the take.

Q. And the lake is also between them and the rest of the land?

A. That is correct. They are not accessible except by a very roundabout way.

(Testimony of W. J. Carrothers.)

Q. Now, of the remaining lands, what other categories did you have there?

A. Well, I have tillable lands and grazing land, tillable lands north of the river.

Q. How many acres of that?

A. There is 170 plus 115.8.

Q. Why did you distinguish that?

A. If you will notice, the northwesterly tracts there comprising 170 acres are again isolated, and the travel and isolation make them less desirable, and size, too.

Q. Now, then, how many acres of grazing in the remaining? [371]

A. 236.7. Those lands, in my estimation, have no particular utility because of their isolation from sources of stock water due to the intervening ownership between them and the river after the taking, and the size, and the fact that they are only desirable as dry grazing land, and they are completely out of balance as a stock operation, and I don't think now it would be suitable for raising stock.

Q. In your appraisal of these lands, did you consider the productivity of the land?

A. I did.

Q. Then, Mr. Carrothers, based upon the matters and facts to which you have testified, including the description of the land, your classification of the highest and best use and the productivity and size, do you have an opinion of the fair market value of the Clarence Kolstad lands before taking on May 24, 1955?

A. I have.

(Testimony of W. J. Carrothers.)

Q. Now, what is that opinion?

A. \$410,500.

Q. Now, similarly, do you have an opinion of the fair market value of the Clarence Kolstad lands after the taking on May 24, 1955? A. Yes, sir.

Q. What is that opinion?

A. \$103,500. [372]

Q. The difference between those is \$307,020?

A. That is correct.

Q. Now, that, in your opinion, is the damage in the taking from the Clarence Kolstad land?

A. Correct.

Q. Had you determined what the across-the-board value of those lands was before the taking?

A. Approximately, yes, sir, \$79.

Q. \$79? A. That is correct.

Q. Did you determine the across-the-board value after the taking? A. Yes, sir; \$74.

Q. Now, then, within these various classifications of plowed, tillable, bottom, grazing, and alfalfa, do you have an opinion, based upon all of your experience in this area, of the unit value of these various categories? A. Yes, sir.

Q. What is that, please?

A. On wheat land, I feel that the average value is \$115 per acre.

Q. Continue with the other classifications.

A. Tillable land, \$100 per acre; bottom lands, that is, undeveloped bottom land, \$35 per acre; alfalfa lands, \$125 per acre; the dry land grazing lands, \$10 per acre. [373]



(Testimony of W. J. Carrothers.)

Q. Now, directing your attention to the Alta Kolstad lands——

The Court: Pardon me; may I ask a question, first?

A. Yes, sir.

The Court: With reference to the westernmost tract that you referred to of the Clarence Kolstad land, did you attribute any value to that land before the taking?

A. Yes, sir.

The Court: As I understand, you say you didn't attribute any value to it after the taking?

A. No, sir. I had before the take—let me explain it this way: For the tillable land—let's take one category, tillable land at \$100 per acre on all locations north of the river. Subsequent to the take, I reduced them in market value in different amounts, Judge, that is why I segregated them. In other words, they being isolated there, you will notice you have one good block of land left——

The Court: What I wanted to find out was in that block of land, that tract of land, wasn't that just as isolated before the taking as it was after the taking?

Mr. Schiltz: Shall I flip the map so you can see?

A. Yes; it was just as isolated.

The Court: Did you then attribute a value to it before, but you didn't after, is that right?

A. No, sir; that is not right. I attributed value to it [374] before and after. However, I did reduce



(Testimony of W. J. Carrothers.)

it more in market value after than I did before because your whole unit is decreased in market value. I decreased it all, but decreased that a little more.

The Court: Very well. I understood you didn't give it any value afterwards. I understood that was what your testimony was?

A. I did give it value.

The Court: You gave it less value after than before?

A. Maybe this will clarify it, Judge. I gave that portion \$75, the farthest west, the tillable land farthest west \$75 afterwards, and I gave the other \$85, the other tillable land, afterwards.

The Court: How much value did you give that before?

A. A hundred dollars per acre in both instances.

The Court: As I understood it, your reason was because it was isolated. What I want to know is, wasn't it just as isolated before the taking as it was after the taking?

A. You are quite right, but it was part of a larger unit, and as such it would be a little bit more desirable, in my opinion.

The Court: Very well; proceed.

Q. (By Mr. Schiltz): Then, directing your attention to the Alta Kolstad lands——

The Court: Pardon me, before you get started on that, it is [375] time for a short recess. Court will stand in recess until half past four.

(Jury admonished.)

(Testimony of W. J. Carrothers.)

(10-minute recess.)

The Court: You may proceed.

Q. (By Mr. Schiltz): At the recess, Mr. Carrothers, we were just beginning to talk now about the lands belonging to Alta Kolstad. Are you familiar with those lands? A. Yes; I am.

Q. How did you go about appraising those lands, did you follow a similar pattern to the Clarence Kolstad lands?

A. A similar pattern, but my classification pertained only to this portion where before it had encompassed the whole ownership.

Q. Again, you had all the basic information on which to form an opinion? A. That's right.

Q. Now, did you break these lands down into a highest and best use category?

A. Yes; followed the same pattern as the other.

Q. How many acres did Alta Kolstad have before the taking on May 24, 1955, before the taking?

A. 4,699.47.

Q. And how many of those acres were cultivated? A. 1,666.59.

Q. How many were tillable? [376]

A. 1,109.2.

Q. And how many were alfalfa land?

A. 12.

Q. 12? A. Yes, sir.

Q. And how many were bottom lands?

A. 45 acres.

Q. And how many of upland grazing?

(Testimony of W. J. Carrothers.)

A. 1,867.08.

Q. After the taking on May 24, 1955, how many acres were left to Alta Kolstad? A. 2,868.58.

Q. Now, before the taking—you are familiar with this map, Defendants' Exhibit 7?

A. Yes; I have studied it.

Q. Do the outlines and classifications appearing on that map agree substantially with the classifications you have just given for the Alta Kolstad land before the taking? A. Yes; they do.

Q. Then, I remove the first overlay to the outlines and classifications shown on the remaining area. Do they agree substantially with your own areas?

A. Yes; they are substantially the same.

Q. How many acres did you say Alta had after the taking? A. 2,868.58. [377]

Q. How did they break down into use?

A. Well, the same general classifications. However, for the purpose of arriving at market value, I have changed the categories in value. For instance, that portion lying south of Willow Creek there and a portion lying north, I have carried as separate areas.

Q. When you say south of Willow Creek, you mean this area right here (indicating)?

A. Yes, sir; that has 232.9 acres of wheat and 106.74 acres of tillable land.

Mr. Galles: Repeat that, please. I missed that.

A. 232.9 acres of wheat land, and 106.74 acres of tillable.

(Testimony of W. J. Carrothers.)

Q. Referring to the north unit, how does that break down by use classification?

A. 802.7 acres of wheat land.

Q. How many acres of tillable?

A. 843.26.

Q. Did you have more to that answer?

A. Grazing.

Q. How many acres of grazing did you have?

A. 882.99.

Q. Were they all in the north unit?

A. No; there was some in the south. However, I did not make a different category out of the grazing lands.

Q. Based upon the matters and facts to which you have [378] testified, including the description of the land, your classification of highest and best use, productivity and size, do you have an opinion of the fair market value of the Alta Kolstad lands as of before the taking, the date of May 24, 1955?

A. Yes, sir.

Q. What is that opinion? A. \$329,500.

Q. Similarly, do you have an opinion of the value of Mrs. Kolstad's lands, Alta Kolstad's lands after the taking on May 24, 1955?

A. Yes, sir.

Q. What is that opinion? A. \$202,500.

Q. And computing the difference between the two, it is \$127,000? A. Yes, sir.

Q. That represents your opinion of the damage in the taking? A. Yes, sir; that is correct.

Q. Now, then, as part of your opinion, did the



(Testimony of W. J. Carrothers.)

fact that some of these lands were isolated enter into your opinion of fair market value after the taking?

A. Yes; as I have stated, I made two categories of wheat land, those lying north and those south of Willow Creek, and with only 232 acres isolated south of the creek, it makes that much less desirable segregated from the balance of the [379] unit by that body of water. Therefore, I——

Q. It can't properly be called part of a unit anymore, then, is that your point?

A. Practically speaking no. In ownership it still is, but operationally, it is not a part of the unit.

Q. In this here, did you assign the same unit values as you did in the Clarence Kolstad land?

A. Yes.

Q. Now, then, directing your attention, Mr. Carrothers, to the joint lands of Clarence and Alta Kolstad——

A. Yes.

Q. Did you inspect and examine and study those lands along with the other lands?

A. Yes; I did.

Q. You are familiar with the lands shown on this map, and recognize them as your joint property?

A. Yes.

Q. Have you appraised these lands for their fair market value both before and after the taking for Mr. and Mrs. Kolstad?

A. Yes, sir.

Q. I presume—well, I won't presume. Did you go about this appraisal in the same fashion as you



(Testimony of W. J. Carrothers.)

went about the appraisals for Mr. and Mrs. Kolstad in their individual lands?

A. Yes; I used the same process. [380]

Q. Again you had the same basic information from previous contact with the land? A. Yes.

Q. How many acres did you find that Mr. and Mrs. Kolstad owned jointly before the taking on May 24, 1955? A. 7,422.84 acres.

Q. And how were those lands classified as to use before taking?

A. My classification was 1,560.48 acres of wheat land; 1,650.6 acres of tillable land; 1,656.97 of bottom land; 201.50 acres of alfalfa; 2,353.29 acres of dry grazing.

Q. Do those classifications agree substantially with the classifications shown on Defendants' Exhibit 10? A. Yes; substantially they do.

Q. Now, then, how many acres were left to Mr. and Mrs. Kolstad after the taking on May 24, 1953?

A. 2,903.3 acres.

Q. Tell us how those broke down by classification of use?

A. 186.4 acres of wheat land lying—let me have the other map—lying northerly of the river, and 1,006.48 southerly of the Marias River.

Q. Of what class, wheat? A. Yes.

Q. All right.

A. 1,332 acres of tillable land, mostly lying northerly of [381] the river, and there is some south. I have not broken those down into different

(Testimony of W. J. Carrothers.)

categories; and 1,380.26 acres of grazing land both north and south, making 3,903.3.

Q. Now, then, based upon the matters and facts to which you have testified, including the description of the lands, your classification of the highest and best use, productivity of the lands, and the size of the units, do you have an opinion of the fair market value of the joint lands of Clarence and Alta Kolstad before the take on May 24, 1955?

A. Yes, sir.

Q. What is that opinion? A. \$457,500.

Q. Do you likewise have an opinion of the fair market value of the lands of Mr. and Mrs. Kolstad after the take on May 24, 1955? A. Yes, sir.

Q. What is that opinion? A. \$271,000.

Q. And subtracting one from the other, the difference is? A. \$186,500.

Q. And that is your opinion of the damage in the taking, by reason of the taking?

A. Yes, sir; that is my opinion.

Q. In your opinion as to these joint lands here, did you take into consideration the fact that the lands are left in [382] two separate and distinct units?

A. Yes, but except for isolating small areas of land, wheat land, north of the river from the main portion, I think there is little effect on the wheat land. The pasture lands, I think—that is the grazing lands—I think they are greatly depreciated in value because of reduced utility. They lack water supply, and all of the bottom lands and the fall and

(Testimony of W. J. Carrothers.)

winter pasture and the winter range have all been taken, leaving only the upland grazing, which destroys, completely destroys the balance of the stock operation. In my estimation, it hasn't much value left as grazing lands.

Q. Did you form an opinion as to the unit value of the various classifications of land?

A. They didn't vary from the others.

Q. Well, now, before we close with you, tell us, how did you arrive at your unit values that you have testified to?

A. Well, as I partially explained, I studied these recent sales, and from them determined that there wasn't much of a pattern in the market as to the sales, and I inquired as to the reason for this by contacting informed sources, including operators, real estate men, county officials, and so forth, who had knowledge of the area. I found that there were no desirable places, that is, economic units on the market. The real estate people contacted had no listings, I could hear of no large properties for sale that would compare with the [383] subject properties, and I also found that, as I think I previously stated, that during the past five to six years, there had been a considerable increase in the market as evidenced by sales and the consensus of informed sources as to what was happening, which was an indication that the market had gone up. Continuing this, as I stated previously, I was engaged in other appraisals, I also contacted all of these owners, some of whom had tried to replace themselves, and

(Testimony of W. J. Carrothers.)

with them I inspected some of the places they had tried to purchase to replace themselves for the lands taken. I also contacted a great many operators and well informed farmers in the area, and got expressions of opinion as to production in the area, as to land values in the area, and it is my belief that opinion, particularly informed local opinion, is one of the very definite indications of market value.

Mr. Schiltz: You may cross-examine.

### Cross-Examination

By Mr. Galles:

Q. Mr. Carrothers, this cattle operation you spoke of for which you allowed some value because of the detriment to the land as a result of the taking, what kind of cattle operation do you think could be used on lands of this type, considering it is primarily a wheat farm? [384]

A. Well——

The Court: Pardon me; are you speaking of a particular ownership here now, or just generally?

Mr. Galles: No; on any of the Kolstad properties.

A. Do you mean before or after the taking, Mr. Galles?

Q. Well, let's take it before.

A. Well, before, particularly in that portion belonging to Mr. and Mrs. Kolstad jointly, if you will note, there is a large amount of bottom land. Now, there was, prior to the taking, just westerly of the



(Testimony of W. J. Carrothers.)

Turner Bridge—I think that is in Section 14, I believe it is—there was an area there on the bottom that was an excellent wintering ground. There was brush covering and open ground there for winter feeding and for protection. It was an excellent wintering ground. Also, there were a considerable amount of bottom lands, and there was some developed hay lands.

Q. The former owner, Mr. Kolstad, didn't run any cattle on it?

A. No, but I understood your question to say what type of cattle operation would it make.

Q. Yes; he didn't run any, but you think this is the best type, as a wintering operation on the joint ownership land?

A. The bottom lands are the wintering quarters in this country.

Q. Right. [385]

A. Now, I believe you brought up the question of my difference in valuation before and after the taking of the bench lands, their dry land grazing. Without the balance of hay lands, winter grazing, shelter, late fall and winter browsing and feeding in the bottoms coupled with your early spring grazing—you have got balance there for a stock operation, and when you take that away, it is a reduction in the general value of all the lands, taking it away so you have only dry lands left. You haven't much actually left.

Q. You think this is the best piece of land for



(Testimony of W. J. Carrothers.)

a wintering cattle operation, compared to say, Alta Kolstad's?

A. Well, Alta Kolstad, I don't think is as good. Now, Clarence Kolstad's, at the mouth of Willow Creek, it can be compared as a wintering grounds, that is, the bottoms there, but those bottoms along Willow Creek are not as good for wintering, in my estimation.

Q. You say along Willow Creek they are——

A. Not as good, not, as I said before, not protected quite as much in most cases, although there are some deep draws there.

Q. What about a summer operation for the Alta Kolstad property?

A. There are a great deal of summer pasture facilities in the three operations.

Q. To have a summer operation, they would have to fence off [386] the summer wheat crop, so that would be eliminated from the summer operation?

A. That's right.

Q. The sales you considered, were they all after the date of taking, Mr. Carrothers?

A. The sales I considered were from 1952 to the last sale in 1956 of which I had knowledge.

Q. You said that you considered the recent sales as being the best indications, I think?

A. Well, those are all recent sales, Mr. Galles, in my interpretation. However, as we progress in time in a rising market, I feel some of the later sales, particularly around 1955, more closely approximate the market in May of 1955, and also, as

(Testimony of W. J. Carrothers.)

I believe I previously have stated, the market, or expressions of value that I could find from various sources seemed to stabilize at this later date, not around 1952 and 1953, that is correct, although I considered those sales. I considered all the sales of which I had knowledge.

Q. Do I understand that on the date of taking, you think the market had stabilized?

A. It was beginning to, indicating values were beginning to jell, if I could put it that way.

Mr. Galles: I think that is all.

Mr. Schiltz: No other questions.

The Court: Say, I wonder if you would display Exhibit 10? [387]

Mr. Schiltz: Yes; is that the joint property?

The Court: I think it is the first one on the board. Just take the other two off. Mr. Carrothers, what is the land marked in yellow?

A. That is—on that map, that is plowed land, I mean newly broken land, which I have thrown into the cultivated category. I didn't break it down that fine.

The Court: Does that land remain after the taking?

A. No; that large block of yellow is the old designated Tract 11. It is all taken.

The Court: That is all taken. Very well, that is all.

(Witness excused.)

Mr. Schiltz: The defendants rest, your Honor.

(Jury admonished.)

The Court: Court will stand in recess until 10:00 o'clock tomorrow morning.

(Thereupon, a recess was taken until 10:00 o'clock a.m., the following morning, January 19, 1957, at which time the following proceedings were had.)

Mr. Galles: May it please the Court, counsel, ladies and gentlemen of the jury, at this time I will give a very brief opening statement and tell you what you may expect in the way of evidence on behalf of the United States in connection with the three parcels of land involved.

We will first put on a witness to identify the aerial photograph of each of these three parcels in order to show you the relative location of the river and breaks and give [388] you a little better idea of the terrain and how the land lies. Following that will be a witness to identify certain maps that were prepared from not only the aerial photographs, but other data gathered in the field, as well as records of the P.M.A. and A.S.C. offices and other land survey offices.

Then, we will put on experts, two of whom have lived in this area, one in Liberty County, for a great many years, and one in Toole County for a great many years. Both have been in the real estate business for a living and have known and seen land transactions up to and including, even some after, the time or date of taking in this case.

Another expert will be one that is in the employ of the Bureau of Reclamation who made a specific inspection and appraisal and has an opinion to express on the lands involved in this case; and our final expert will be Henry Murray, a Montana man living in Missoula who is in the business of land appraisals and land values. A great deal of his work is done in connection with farm lands, and he, of course, is hired by our office to make such an inspection and appraisal and express an opinion.

The other witness we expect to produce is Joe Mizner. Now, he is a fairly young fellow who has been in the farm and ranch business a long time in the area, and from the years 1947 through 1952, he operated these three places under lease, and he will tell you what the average production was of [389] grain, wheat, during the time he operated it, as well as the great amount of tillable land he broke up during the time he had it under lease, and the fact that there was only six or eight hundred acres of old land plowed out of all this acreage when he first went on the place. That will conclude our evidence—oh, Mr. Mizner will also testify that in connection with tillable land, he purchased about the date of taking some tillable land at the rate of \$40 per acre, and it was good, tillable land. He will describe it for you.



## CHARLES KNELL

called as a witness on behalf of plaintiff, being first duly sworn, testified as follows:

## Direct Examination

By Mr. O'Connell:

Q. State your name, please?

A. Charles Knell.

Q. Where do you reside?

A. Billings, Montana.

Q. What is your occupation?

A. I am in charge of the Photographic Section or Division for the Bureau of Reclamation in the Western States. That includes, Montana, Wyoming, North Dakota, South Dakota, transmission lines in Minnesota, parts of Nebraska and—I think I have covered it. [390]

Q. How long have you been so employed?

A. I have been with the Bureau of Reclamation since August of 1946; August 19, 1946.

Q. Then, you are a photographer, is that right?

A. Yes; I am basically a photographer, yes.

Q. And what experience have you had in the field of photography?

A. Well, I have been in photography for more than 20 years. I was with—I made a study of photography from the year 1930 through 1935. I worked as an apprentice and copy boy during those years. In 1936, I was made a staff member of the staff of International News Reel, or Hearst Photos, which is the same company.



(Testimony of Charles Knell.)

Q. Going back to the first experience you spoke of, tell us who your employer was?

A. The period prior to being employed in 1936?

Q. Starting from the beginning, who were your employers?

A. Through the years from 1932 to 1936, I worked while I was in school for the Washington Times Herald, and for a newspaper called the Washington Sun, which is non-existent at the moment. That is where I worked those four years. In 1936, I was employed as a staff member for the International Photo or Hearst News Reel, whichever name you care to apply to it. In 1949, I was transferred to the regular White House desk of International News Photos—pardon me, I said [391] 1949, I didn't mean 1949, I mean 1938, 1939, in the fall and summer of 1938 and 1939, I was moved to the White House, and stayed there until August of—July—one minute, please—1942, October, 1942; October 10, 1942, and on October 10, 1942, I entered the Marine Corps and took basic training at Paris Island, South Carolina, and I was sent from there to the Marine Schools and served as an instructor in the United States Marine Corps until the end of the war. At the end of the war, I returned to my—I wish to go back just a minute, if I may.

Q. Very well.

A. In 1942—that is not 1942—from 1942, from October, 1941, until 1942, I had entered the United States Department of Agriculture, and had worked for the Agricultural Research Administration doing

(Testimony of Charles Knell.)

scientific and technical photography. I moved from there to the United States Marine Corps, and came back from the Marine Corps and went to work for the Department of Agriculture again in my old job. In August, 1946, the Bureau of Reclamation asked me if I would be interested in coming into the Bureau of Reclamation and coming into the Western States with headquarters at Billings, Montana. Having been here once and liking Montana, I came back here in that capacity as head of the Photographic Section for the Bureau of Reclamation in these states that I have mentioned. [392]

Q. Have you done any aerial photography?

A. Considerable, particularly since I have been with the Bureau of Reclamation, and I had considerable experience before in aerial photography. I had made many on assignment, assigned to the Army and Coast Guard to make aerials on assignment from International News Service.

Q. Do you fly yourself?

A. I am a pilot, yes.

Q. When you are taking a picture, do you fly?

A. No; we have a full-time pilot that operates the Bureau's aircraft. I only maintain control of the camera during the flight.

Q. You are in the plane, is that right?

A. Yes.

Q. And have you taken any pictures of just land, aerial photographs, for the Bureau?

A. Yes; considerable photographs. We have constructed about 3,000 miles of transmission line all

(Testimony of Charles Knell.)

through the western states from photographs I have made. They are the basis for the construction work. That is a preliminary step in building transmission lines. We do all of their location from photographs.

Q. Did you ever photograph any lands known as the Clarence Kolstad ranch?

A. I did. I photographed both from the air, and I have been [393] on the property on the ground.

Q. Did you take any photographs on the ground?

A. I did.

Q. I am going to show you an object which has been marked for the purposes of identification as Plaintiff's Proposed Exhibit No. 21. Can you identify that?

A. Yes; it is the aerial picture that I made.

Q. When did you make these?

A. I made them in 1953; November 4th.

Q. And I notice that there seems to be a number of different pictures sort of stapled together here. Explain that.

A. Well, in aerial photography, you make consecutive pictures, and the centers of those pictures have been taken out of the negatives and put down here to where the matching points meet, and by transferring the principal points, I have maintained control to lay what would be termed a mosaic of the Knutson property, with this exception: I have made one deviation from that in order to put it on this board. From this range line here to this property (indicating) is two miles. You see, I have moved that in just to get it into the exhibit. Otherwise,

(Testimony of Charles Knell.)

it would mean running 12 inches or more out to the side.

Q. You are indicating a small insert in the side portion, is that right? [394]

A. That's right, set to the west of the range line here (indicating).

Q. Now, from what elevation would you take a picture like this?

A. This particular picture is what—you are speaking of this particular picture?

Q. Yes.

A. These photographs were made at 5,000 feet above average ground level of 3,100 feet, 5,000 feet above the ground.

Q. You made all of these personally?

A. I made every picture personally.

Q. Who matched them together?

A. I supervised it, and did most of it. I had some assistance, but I was there every minute it was being done.

Q. Did you check the work after it was finished?

A. I checked the work and the original negatives, and checked the photographs for compliance with General Land Office maps. That is what most maps are made from where they exist.

Q. Is this a fair and accurate representation of what it purports to portray, the Clarence Knutson property?

A. I feel this is a fair and accurate representation of the Kolstad property. In other words, by that I mean if you went up in an airplane and you



(Testimony of Charles Knell.)

looked through the bottom or the floor from the airplane down at the property as you went [395] over it, this is exactly what you would see. There has been nothing removed, taken away or put to it whatsoever. It is an accurate representation of the property.

Mr. O'Connell: Your Honor, plaintiff offers in evidence Exhibit No. 21, and opposing counsel has indicated there is no objection.

The Court: Very well, admitted without objection.

(Plaintiff's Exhibit 21, being the aerial photograph above referred to, was here received in evidence.)

Q. Now, Mr. Knell, I hand you an object marked as Plaintiff's Exhibit 22 for the purposes of identification. Will you please identify it?

A. Well, this is from the same general survey that those photographs were. This is another section of it, and it is parcel 10-A, the Alta Kolstad property.

Q. Is it a fair and accurate representation?

A. It is a fair and accurate representation of what you would see looking down to the ground.

Q. I notice black lines put in all the photographs. Who put those in?

A. They were put in by a draftsman where I had indicated they should go by the use of pencil lines. I am not a draftsman, and the lines were drawn by a Bureau draftsman. I put pencil lines on to mark



(Testimony of Charles Knell.)

the section lines and indicated where they should appear on the photographs, and I checked [396] those against the General Land Office maps.

Q. You are satisfied that the black lines are in the right places?

A. Yes; the dotted line, too.

Mr. O'Connell: Your Honor, plaintiff offers in evidence Exhibit No. 22.

The Court: Any objection?

Mr. Schiltz: None, your Honor.

The Court: It is admitted.

(Plaintiff's Exhibit No. 22, being the aerial photograph last above referred to, was here received in evidence.)

Q. I now show you an object marked Plaintiff's Exhibit No. 23 for the purpose of identification. Will you identify it?

A. It is part of the same general survey that the other two sections were taken from. It is the joint ownership of Clarence A. and Alta Kolstad, Parcel No. 10-C. The lines were put on in the same way, and control maintained in the same fashion.

Q. You took these pictures?

A. I took each and every picture on there.

Q. Would you say this is a fair and accurate representation of what it purports to portray?

A. It is a fair and accurate representation of the property it is supposed to portray.

Mr. O'Connell: Plaintiff offers in evidence [397] Plaintiff's Exhibit 23.

The Court: Any objection?

Mr. Wiggenhorn: No objection.

The Court: It is admitted.

(Plaintiff's Exhibit No. 23, being the aerial photograph last above referred to, was here received in evidence.)

Mr. Galles: You may cross-examine.

Mr. Wiggenhorn: No cross-examination.

(Witness excused.)

### ROGER THUESEN

called as a witness on behalf of plaintiff, being first duly sworn, testified as follows:

The Court: Mr. Galles, I see we are going to have some more maps. Are they different than the maps we do have, or are we——

Mr. Galles: They are in different form. They don't have the overlay, and we think it will give some assistance to the jury to have these maps.

The Court: Why, particularly? I mean, if we have a map that you can use—can your witnesses use the maps that are already in?

Mr. Galles: Except, your Honor, that our experts have used this information on these maps, or these maps are prepared from the information that our experts used in [398] arriving at their opinions.

The Court: Do these maps show anything different than the other maps as to the kinds of land or anything of that nature?

(Testimony of Roger Thuesen.)

Mr. Galles: This one map, for instance, shows new crop land as a distinct color. Then the other classifications are grazing and crop land.

The Court: Well, very well.

### Direct Examination

By Mr. Galles:

Q. State your name, please.

A. Roger Thuesen.

Q. Where do you live and what do you do?

A. Billings, Montana; employed by the Bureau of Reclamation.

Q. In what capacity?

A. At the present time, I am head of the Appraisal Section, at the present time.

Q. I will show you what has been marked as Plaintiff's Exhibit 24, and ask you if you can identify it, please?

A. Yes; that is a map that was prepared under my supervision showing the Clarence A. Kolstad land which we call Parcel No. 10-B. It was prepared by information gathered in the field, by visual inspection on the ground, and by actual surveys for locating new crop land.

Q. Were the aerial photographs that have been received in [399] evidence used in the preparation of this map?

A. They were used to a certain extent for the background, then there was an inspection made of the fields in the area to make sure they were the same fields and to see that nothing had been changed.

(Testimony of Roger Thuesen.)

Q. Is this exhibit accurate as far as the land descriptions go and the classifications as supplied to you by these various forms of information?

A. I would say so, yes.

Mr. Galles: The Government offers in evidence Plaintiff's Exhibit 24.

Mr. Wiggenhorn: No objection.

The Court: Admitted.

(Plaintiff's Exhibit 24, being the map last above referred to, was here received in evidence.)

Q. I show you Plaintiff's Exhibit 25 and ask you to identify this exhibit, please?

A. This is a map prepared basically the same way of what is known as the Alta Kolstad land, Parcel 10-A. This map was prepared by information gathered in the field, by the use of the aerial photographs, by some actual photographs made, and visual inspection on the ground.

Q. In the same manner as the previous exhibit?

A. Yes.

Q. Is it accurate? [400]

A. I would say so.

Mr. Galles: The government offers Plaintiff's Proposed Exhibit 25.

Mr. Wiggenhorn: No objection.

The Court: Admitted.

(Plaintiff's Exhibit 25, being the map last above referred to, was here received in evidence.)



(Testimony of Roger Thuesen.)

Q. I show you what has been marked as Plaintiff's Proposed Exhibit 26, and ask you to identify it, please?

A. This is another map. This covers the property owned jointly by Clarence and Alta A. Kolstad. Again it was prepared basically in the same manner.

Q. Would you say it is accurate?

A. Yes; I would.

Mr. Galles: The government offers in evidence Exhibit 26.

Mr. Wiggenhorn: No objection.

The Court: Admitted.

(Plaintiff's Exhibit 26, being the map last above referred to, was here received in evidence.)

Mr. Galles: That is all.

#### Cross-Examination

By Mr. Wiggenhorn:

Q. Mr. Thuesen, you have shown in your legend here certain [401] classifications of crop land, new crop land and grazing land, have you not?

A. Yes; that is the three basic classifications shown on the map.

Q. Those are the only classifications shown there, are they not?

A. That is the only classification shown, except that there is lettered in there in small letters where

(Testimony of Roger Thuesen.)

the bottom grazing is and where the upland grazing is. It is not distinguished by colors.

Q. That pertains to all three of the maps you have identified?

A. Yes; they were made by the same method.

Q. When was the data obtained for this classification?

A. Beginning in 1953, up until the date of taking, and it has been followed through since the date of taking.

Q. And that was done by the Bureau of Reclamation, yourself and other men working with you in conjunction with you?

A. That is correct.

Mr. Wiggernhorn: No further cross.

(Witness excused.)

The Court: Call the next witness. [402]

GEORGE H. GAU

called as a witness on behalf of plaintiff, being first duly sworn, testified as follows:

Direct Examination

By Mr. Galles:

Q. State your name and where you live?

A. My name is George H. Gau. I live at Kalispell, Montana.

Q. How long have you lived in Kalispell?

A. Since 1953.

Q. Where did you live before that?

A. Chester, Montana.

(Testimony of George H. Gau.)

Q. How long did you live there?

A. I came to Liberty County. I homesteaded there in 1912. I lived in Liberty County from 1912 to 1953, outside of the time when I was in the First World War, which is about 16 months.

Q. What did you do during the time you were in Liberty County?

A. For 30 years I was Clerk of the District Court. When the County was organized in 1919, I was the first Clerk of the District Court. I resigned in 1949.

Q. That is an elective office?

A. That's right.

Q. You were elected continuously during the time you held the office? [403]

A. That's right.

Q. Did you have any other occupation or avocation?

A. I was in the insurance business, and in the early years, I represented different banks that are now functioning in Havre, Montana.

Q. When you say you represented banks, did that have anything to do with real estate?

A. No; that was mostly loans.

Q. Loans on lands?

A. Loans on livestock, mostly, farm machinery.

Q. Did you hold any other office while you were in Chester or Liberty County?

A. I was Mayor of the town of Chester for 14 years.

Q. Now, did you make an inspection and ap-

(Testimony of George H. Gau.)

praisal of the Kolstad properties involved in this action?      A. Yes, sir; I did.

Q. When did you first go on the property for that purpose?

A. I was called to Great Falls on St. Patrick's Day, March 17, 1954, and was hired and was told to go back to Chester and set up sleeping quarters for the other two men that were hired at the same time I was. I was in charge. I did, and in a few days, why, we all came on the job, and our first line of work—especially when I was there three or four days——

The Court: Mr. O'Connell, there is too much noise going on, counsel can't hear, it distracts him. I think you had better [404] leave the exhibits go for awhile.

A. We went to the Assessor's office, and from the Assessor's office over to the Allotment Office in Chester; then likewise, we done the same thing at Shelby to get the true ownership of the Kolstad property, and also the allotment which was then in effect, and in due time, why a government car was furnished to the three of us.

Q. Let me interrupt here to ask who the other two men were?

A. Mr. McHale from Shelby and Ralph Koefod from Havre.

Q. Then what did you do?

A. We proceeded—well, I think in the first week, I drove out to Clarence Kolstad's homestead there, and he gave us his allotment papers and we went



(Testimony of George H. Gau.)

back and checked those and checked with the acres that we figured that he had at that time that were tillable. Then we made a number of different trips out on different farms and practically checked every 40-acre tract in the place.

Q. That was the three of you together?

A. Three of us together. We had our maps with us, and we had our plats, checking on the ownership, and we made a detailed report on practically every 40 acres.

Q. When did you say this was?

A. That was the latter part of March, April and May.

The Court: Of what year?

A. 1954. [405]

Q. So it extended over quite a number of weeks that you were on and off the property?

A. Yes; we would be sometimes two weeks at a time there. We would quit a few days, we would have other business to take care of, we would get a recess, and we would appear again and go back and recheck again.

Q. And during March, April and May, you were inspecting other lands as well?

A. Yes; it wasn't just the Kolstad land.

Q. Now, in addition to your checking the county records and inspecting the property, did you do anything else, Mr. Gau?

A. Oh, we talked between ourselves as to the values of land and tried to get an idea, and Mr. Koefud is in the real estate business and a big land-

(Testimony of George H. Gau.)

owner in Hill County. I, myself, own land in Liberty County, and I look after another 14 or 15 farms in Liberty County. Mr. McHale is from Toole County and is in the insurance and real estate business. He has been selling lands over a number of years; Koefud has, and so have I.

Q. You say you look after land in Liberty County. What do you mean by that?

A. I act as agent for absentee landlords that don't live in the State of Montana. Some places I have looked after for 20 or 25 years. It starts from the country straight north of Joplin and works down to the Marias straight south of Joplin; [406] then I have lands south and north of Chester, north of Lothair, they are scattered all over through the county.

Q. As agent, does that mean you supervise the operation of farms and collect the crop—was it rented on a crop share?

A. A one-quarter crop share basis.

Q. Is that the usual basis in that area, one-quarter?

A. We have some we get one-quarter up to 20 bushels; over 20 bushels, now we get one-third. Years back it was one-fifth.

Q. It is changed to one-quarter and then a modification of the one-quarter rental basis?

A. That's right.

Q. Did you consider any sales of property in the vicinity of this land in either Toole or Liberty Counties?

(Testimony of George H. Gau.)

A. I have known of a lot of sales for the last 10 years in Liberty County. At that time we considered sales, yes, sales that had been made prior, and were being made, you know.

Q. You made this inspection and done all the things you said to this point before the date of taking. Have you done anything since the date of taking that would have an effect upon your opinion?

A. I have checked sales and listened to sales and have been told about different sales since the date of taking.

Q. You have taken those matters into consideration up to the present time—— [407]

A. That's right.

Q. ——in arriving at your opinion?

A. Yes.

Q. I will ask you if you have an opinion of the fair market value of the Clarence A. Kolstad property before the taking, that is, the whole ownership by Clarence Kolstad before the taking?

A. Yes; I have.

Q. I will hand you Exhibit No. 27, and ask you if you can identify that, Mr. Gau?

A. That is a copy of my original.

Q. Original what?

A. Original value as I have set it up on this property here, the Clarence A. Kolstad property.

Q. This is a summation of the opinion that you have as to the value of the Clarence A. Kolstad property?

A. That's right.

Q. That is, insofar as the first page is concerned.

(Testimony of George H. Gau.)

The other pages relate to the other two parcels involved in this action, is that correct?

A. This is known to me as the Wasesha place. That is the former owner. This is the Alta Kolstad place.

Q. Now, you have referred to the Wasesha place as the first page? A. Yes. [408]

Q. The second page is known to you as the Alta Kolstad place?

A. That's right, and this is the land of C. A. Kolstad and Alta Kolstad, jointly.

Q. You have referred to the last page?

A. Yes.

Q. Would you state what your opinion is of the fair market value of the Clarence Kolstad property, of his entire ownership before the taking?

A. Do you want the number of acres?

Q. No; the total value. A. \$277,592.62.

Q. And how did you arrive at that value, Mr. Gau?

A. That is on the breakdown of the different holdings or the different acres in this holding, that is how I arrived at it.

Q. You mean by classification, by land classification? A. That's right.

Q. What classifications, and how many acres of each did you find?

A. I classified with the other two the land that can be irrigated, about 60 acres.

Q. What other classifications?

A. Crop land, 2,081.5; new crop land, 495 acres;



(Testimony of George H. Gau.)

bottom land, 1,061 acres, and potential crop land, 580 acres; grazing, 921.21 acres, a total of 5,198.70 [409] acres.

Q. Now, what per acre value did you assign to each of those classifications, and what was the total amount that you have extended?

A. The 60 acres of irrigable, I placed a value on that of \$125, or a total of \$7,500; the crop land, a total of 2,081.5 at \$85, a total of \$176,927.50; the new crop land of 495 acres, a total of \$50, \$24,750; bottom land, a total of 1,061 acres at \$40 an acre, \$42,400; and potential crop land, 580 acres, \$25 an acre, \$14,500; and grazing, 921.21, at \$12.50, \$11,515.12, a total of \$277,592.62.

Q. Were there any improvements on the Clarence Kolstad place?

A. We didn't give him any improvements because the buildings were in pretty bad shape for repairs.

Q. There were some buildings and structures on it but you gave them no value?

A. No value.

Q. Do you have an opinion as to the fair market value of the land remaining to Clarence Kolstad after the date of taking as of May 24, 1955?

A. Remaining, we have that set up at \$78,694.

Q. And how did you arrive at that, Mr. Gau?

A. Crop land, 806.5, \$85 per acre, \$68,532.50; potential crop land, 300 acres at \$25, \$7,500; and there is remaining 293.5 acres of grazing at \$9,

(Testimony of George H. Gau.)

\$2,641.50, a total of 1,400 acres [410] remaining at a price of \$78,694.

Q. I notice your per acre values remain the same in the remaining unit as you assigned to the whole unit except for the grazing land, which was \$12.50 and now you have assigned \$9.00 an acre. Would you explain that, the reason why you reduced your value of the grazing land after taking?

A. In the whole unit, we had it at \$12.50 and in the remaining at \$9.00. We were giving them that for severance, the \$3.50 per acre, because it has not much value as a tie-in for the other land.

Q. You think each acre was reduced \$3.50 an acre because of the taking? A. That's right.

Q. Subtracting the remaining value from the before value, what figure do you get?

A. I have \$198,898.62.

Q. Now, do you have an opinion as to the fair-market value of the Alta Kolstad property as of May 24, 1955, before the taking, that is, her entire ownership before taking?

A. Yes, sir; I have.

Q. Would you state what that opinion is?

A. As to the amount now again?

Q. Yes; the total amount.

A. That is \$188,519.62, along with improvements of \$3,550, which makes a total of \$192,069.62. [411]

Q. How did you arrive at that?

A. There is crop land, 1,140.5 acres at \$85 an acre, a total of \$97,707.50; upland tillable, 300 acres at \$25, \$7,500; grazing, 1,379.9, at \$9 an acre is \$12.-

(Testimony of George H. Gau.)

411.81, or a total of 2,828.59 acres, and a total of \$117,619.31.

Q. And what is the difference between the remaining value and the before value?

A. \$75,450.31.

Q. Now, do you have an opinion as to the fair market value of the joint ownership of C. A. and Alta Kolstad, as of May 24, 1955, before the taking, that is, their total ownership?

A. That is as to the value now?

Q. Yes; including improvements, if you have improvements included.

A. The total value is \$251,482.62, with improvements of \$6,100, or a total of \$257,582.62.

Q. How did you arrive at that, Mr. Gau?

A. Well, we have irrigable land, 156.5 acres at \$125 an acre, a total of \$19,562.50; crop land, 1,215 acres at \$85 an acre, or a total of \$103,275; new crop land, 305 acres at a value of \$50 an acre, a total of \$15,250; bottom land, 1,052 acres at \$40 an acre, \$42,080; and potential tillable, 960 acres at \$25 an acre, \$24,000; grazing, 3,785.21 acres at \$12.50, or a total of \$47,315.12. [412]

Q. That totals \$257,582.62?

A. That's right.

Q. Now, if you have an opinion of fair market value as of the same date of the land remaining to Mr. and Mrs. Kolstad jointly, state what that total is? A. \$126,092.85.

Q. How did you arrive at that?

A. There is remaining in that unit crop land,

(Testimony of George H. Gau.)

1,100 acres at \$85 an acre, \$93,500; upland tillable, 460 at \$25 an acre, \$11,500; and grazing, 2,343.65 acres at \$9 an acre, \$21,092.85.

Q. And the difference between your opinion of the value of the remaining from the value of the whole unit is what?      A. \$131,489.77.

Mr. Galles: You may examine.

### Cross-Examination

By Mr. Wiggenghorn:

Q. When did you say, Mr. Gau, that you made this appraisal? I am speaking about these figures you have extended here in your Exhibit 27?

A. When did we make them?

Q. Yes; when were they calculated and set down?

A. These figures here?

Q. Yes, sir. [413]

A. These were set down in the last week after we got the new—there was some new crop land that was put into these here different tracts that weren't in there before.

Q. That is to say, you and Mr. McHale and Mr. Koefud?

A. No, these figures were done by myself.

Q. The three of you got together, or did you do it yourself?

A. These are my separate figures. Mr. Koefud, if he has any, I don't know, and I don't know what figures Mr. McHale has.

Q. Now, looking at those figures, they are a bit



(Testimony of George H. Gau.)

confusing, of course, as are all numbers, but this much is true, it is quite apparent through all of your three respective sets of results, is it not, Mr. Gau, that for the crop land, you have put down a uniform value of \$85 an acre, both before and after the taking, right?      A. That's right.

Q. If you don't speak up and just nod your head, the reporter won't get it. By crop land, do I understand you are referring now to, and you are cataloging that as the land that is wheat land?

A. That's right.

Q. As distinguished from what you have called irrigable land here?      A. That's right.

Q. So that I take it, whether or not you agree with the [414] total acres of the witnesses for the defendants in this case, you are referring to the same kind of land when you call this crop land as they have called plowed ground or cultivated ground, is that right?      A. That's right.

Q. We just have a third name for it now?

A. Yes.

Q. And I notice also, and I want you to tell me whether or not it is not so, that uniformly in each one of these appraisals for these three places, you have not reduced the value in your appraisal for the remaining units left under what you had valued it before the taking?      A. No.

Q. You have not?      A. No.

Q. You still adhere to the \$85 value?

A. Yes.

Q. And the same holds true, does it not,

(Testimony of George H. Gau.)

throughout all of these valuations as you give them here in your exhibit 27 pertaining to all three places as to each one of the other categories as you have broken them down here, irrigable, new crop land, bottom land, potential crop land, and all of them except grazing? That is the only one where you made any reduction at all after the taking, is that true?      A. Yes. [415]

Q. In that case, your reduction was in fact \$3.50 per acre?      A. That's right.

Q. So whereas you start out with a uniform price on all of these places of \$12.50 per acre for the grazing, you made a uniform cut by a uniform scale and after the taking, you value the grazing land remaining at \$9?      A. That's right.

Q. You do recognize, do you not, Mr. Gau, that before this taking there was abundant water both from the Marias River and from Willow Creek available for stock on the grazing land?      A. I do.

Q. And what have you to say as to whether that water was available after the take as you saw the land?

A. I think there will be plenty of water after the taking with all the water they will have down there.

Q. Do you understand that the livestock on the grazing land after the taking would have access to this reservoir, or what remained of the river and creek?

A. I think where there is water, if you have cattle, they will eventually go to water.

(Testimony of George H. Gau.)

Q. Even though they go on Fish and Game Commission land?      A. I do for a fact.

Q. You have assumed then that the cattle would be able to [416] travel to water and there wouldn't be any fence to stop them, a dividing line between the lands remaining—I don't know if this map will show it very well, but I understand these heavy lines bound the lands taken upon this particular exhibit that you see in front of you. At any rate—neither is the lake shown on this exhibit, so it isn't a very good illustration, but you have seen exhibits that show the lake, have you not?

A. Yes.

Q. You do recognize, do you not, and you knew it to be a fact, did you not, that beyond the actual borders of the high water mark of that lake or reservoir, there was additional land that was taken so that assuming there was a fence along the boundary line of the lands after the taking, there was no way the cattle could reach the reservoir, isn't that true?

A. Yes.

Q. But nevertheless, you still thought the cattle could somehow get to water, and therefore, you didn't reduce your value more than \$3.50 for the grazing land after the taking, is that correct?

A. That's right.

Q. Now, this new crop land that you have listed here, by that, I suppose——

A. That is that new breaking. [417]

Q. You heard the testimony of Clarence Kolstad?      A. Yes.

(Testimony of George H. Gau.)

Q. That is what he explained to us had been broken only a few years ago?

A. That's right.

Q. It was broken, however, before the date of taking, wasn't it? I think as he testified here, unless you disagree with him, that land had been broken a year or two before, had one year of summer fallow on it, but hadn't yet raised a crop?

A. Some of it has and some of it was broken later.

Q. After the taking?

A. We were there in the fall of 1955, and he was breaking some then.

Q. Well, I am just interested in what you have gathered together here as new crop land. I assume you are putting down values as of the date of taking, May 24, 1955?

A. That's right.

Q. We are not interested in what happened since that time, are we?

A. It is practically all on our first trip, and later in 1955, there was a lot of land broken.

Q. Your first trip was in March, 1954?

A. Yes. There was a lot of that land broken from 1954 to March, 1955. [418]

Q. Notwithstanding these figures and the values you put down on Exhibit 27 were made last week, the basic information you obtained for the tabulations you have here was back in 1954, was it?

A. No, but I say 1954 was the first time we were on the land, March, 1954.



(Testimony of George H. Gau.)

Q. You might tell us again, when did you see the land again after March, 1954?

A. The last time I think I saw the land was 1955.

Q. In what month of 1955?

A. November, 1955.

Q. Well, just to make the matter clear, can you make clear to us as of what date these lands were so cataloged as new crop land, because what might be new yesterday wouldn't be new today, that is what I am talking about?

A. On what date?

Q. Yes, approximately?

A. As far as I was concerned——

Q. Well, you are the only one that is concerned, if this is your appraisal, you see.

A. Well, when this came up, they said they were changing these here because there was an understanding between all of you as far as new crop land was concerned.

Q. Who was it said that? Who said that?

A. The Bureau of Reclamation. They said they had an understanding [419] there between you with reference to the new crop land.

Q. You were employed by the Bureau of Reclamation in the first instance?

A. That's right.

Q. And you still are?

A. I am at the present time.

Q. All the work you done was done for the Bureau of Reclamation?

A. That's right.

(Testimony of George H. Gau.)

Q. You were employed for the job of making an appraisal for them, were you not?

A. Yes, sir.

Q. And the three of you collaborated and did come up with an appraisal shortly after you first made the inspection before the date of taking?

A. We made a first appraisal on that, yes.

Q. Now, at that time, as I understand it, you were instructed to make an appraisal of all three of these present units in one, were you not?

A. That's right.

Q. Did you treat them differently because you were asked to make one appraisal of the three as one unit than you have now treated them as independent three units?

A. No, I haven't made any change.

Q. You haven't made any distinction in your values in that [420] respect, your breakdown values, have you?

A. No.

Q. And you, therefore, made an appraisal at that time, and I am referring now to some time before the date of taking, May 24, 1955, and some time after March, 1954, when you first entered upon your employment, you made an appraisal of the entire three units combined, did you not?

A. Yes, sir.

Q. What was the figure you came up with at that time for your value of the lands taken, plus severance damage?

A. I don't recall now.

Q. I will remind you, wasn't it \$226,000 about?

A. I was going to say something about that, but

(Testimony of George H. Gau.)

I didn't know for sure. It was between \$225 and 230 thousand.

Q. You do know, as a matter of fact, that based upon that appraisal that you three men made, there was a deposit in this case——

Mr. Galles: I will object to that as not being proper.

The Court: The objection is sustained, and the jury is admonished to disregard any implication rising out of the question asked by counsel with reference to the deposit that was made.

Q. I understood you to say, Mr. Gau, that you took every possible thing into consideration that might bear upon values in coming to your conclusions of value? [421] A. Right.

Q. That's right. Among those things you took into consideration, I believe you mentioned, were sales in the area that you are pretty well familiar with? A. That's right.

Q. Were you and are you familiar with the sale of the parcel of land of about 1120 acres from Gilbert to Leck?

A. I have heard about that in one of the other cases. I am not familiar with it, no.

Q. You hadn't heard of it at the time?

A. No.

Q. You didn't take that sale into consideration then?

A. No, that was over in Toole County.

Q. It happens to be right adjacent to one of these places.

(Testimony of George H. Gau.)

A. It is across the line, though.

Q. Boundary line, you mean? A. Yes.

Q. It joins onto one of these three units you are appraising now?

A. It is real close, and I didn't know anything about that.

Q. You didn't know about it at the time?

A. Only when I heard about it in Court.

Q. At the time you were making the appraisal, you didn't know anything about that?

A. Oh, no. [422]

Mr. Wiggenhorn: That is all.

Mr. Galles: I neglected to offer in evidence the summation sheet of Mr. Gau, which is Plaintiff's Exhibit 27.

Mr. Wiggenhorn: No objection.

The Court: It is admitted without objection.

(Plaintiff's Exhibit 27, being the summation sheet above referred to, was here received in evidence.)

#### Redirect Examination

By Mr. Galles:

Q. Mr. Gau, with reference to the access to water by livestock after the taking, I understood from your cross-examination that you considered that there was access to water by livestock?

A. There will be plenty of water. I don't know if there will be access to the cattle or not.

Q. I see. Now, assuming that the cattle are prohibited from going to the water, that would make a



(Testimony of George H. Gau.)

difference in your opinion as compared to if they were permitted?      A. That's right.

Q. Your opinion is based on the assumption that they are permitted to go to the water?

A. No, it isn't that they are permitted. If there is water down there and you have got cattle, if they are thirsty, they are going to seek a drink. I don't know if they are [423] permitted to go down there or not.

Q. You stated you were employed by the Bureau of Reclamation today to appear and give testimony. You are employed by the government?

A. Not by the Bureau today.

Q. You are employed by our office?

A. That's right.

Q. Your first appraisal was for the Bureau of Reclamation, and your opinion today was for and on behalf of our office?      A. That's right.

Mr. Galles: That is all, thank you.

(Witness excused.)

The Court: Court will stand in recess until 15 minutes after 11.

(Jury admonished.)

(10-minute recess.)

P. R. McHALE

called as a witness on behalf of plaintiff, being first duly sworn, testified as follows:

Direct Examination

By Mr. Galles:

Q. Would you state your name and where you live?

A. My name is P. R. McHale. I live in Shelby, Montana.

Q. How long have you lived there, Mr. McHale?

A. I have lived in Shelby since 1919, but I have lived in [424] what is now Toole County since 1901.

Q. What do you do there?

A. I have been engaged—the last 13 years, I have been engaged in the real estate and insurance business, but I am just about to retire.

Q. And in the real estate and insurance business, you handled real estate sales?

A. I did.

Q. For both buyers and sellers of farm lands?

A. I think it was always for the seller as far as I can recall.

Q. But there were farm lands included in your business?

A. That is true.

Q. Do you own land yourself?

A. Yes, I do.

Q. Farm land? A. Yes, sir.

Q. Do you raise wheat on it?

A. Yes, sir.

Q. Do you operate the farm land yourself?

A. No, it is on crop shares.

(Testimony of P. R. McHale.)

Q. On what shares? A. One-quarter.

Q. Is that the usual fraction in your community?

A. It is except for one small area in the vicinity of [425] Sweetgrass. I think they get a third in some cases, but a quarter is general. I might say in answer to the question that this land I am interested in now is in the process of being sold.

Q. The land you own?

A. Personally or jointly.

Q. Did you have any other business in Shelby in connection with farm lands or connected with farming operations?

A. Well, I was agent for the Travelers Insurance Company there, and I have done quite a bit of appraisal work in home loans in Shelby and the surrounding areas.

Q. Before you got into the real estate and insurance business, what did you do?

A. Well, originally I was in the cattle business with my brother in the Sweetgrass Hills for about 10 years. About 1910, I homesteaded up in the Devon—Galata area.

Q. Is that close to the lands involved in this action?

A. It is in the general vicinity, I should say 10 or 12 miles.

Q. From the Kolstad properties? A. Yes.

Q. In what direction from this property?

A. South and east.

Q. You mean the Kolstad property is south and east of where you homesteaded? [426]

(Testimony of P. R. McHale.)

A. Of my holdings and what were my holdings, and I might add that my sister and I owned at one time a half section that was only a mile from the Kolstad holdings.

Q. You are familiar with the general area here?

A. I would say I am.

Q. And have been for a long time?

A. For many years.

Q. Did you ever work in the County Assessor's office?

A. I was Deputy County Assessor in Toole County for, I think, three or four years during the active season.

Q. Have you had any other experience that bears upon your qualifications to act as a land appraiser and expert in this case that you can think of that I haven't asked you about?

A. Well, at different times—I recall acting for the Twin City Land Company in appraising their holdings in Toole County, and I was on the appraisal board in 1945 that made an appraisal of these lands that are now behind the Tiber Dam, and I think that would cover it.

Q. When you say appraisals, what kind of an appraisal were you to make, what were you to determine, what kind of value?

A. To determine the just compensation for the lands to be taken in the Tiber Dam area that were to be flooded.

Q. Did that involve fair market value?



(Testimony of P. R. McHale.)

A. Yes, that is what we were supposed to arrive at.

Q. Now, you made an appraisal of these lands for the Tiber [427] Dam Project in 1945. Did you make a subsequent appraisal of the lands?

A. In 1954.

Q. That was in connection with Mr. Gau and Mr. Koefud?      A. That is correct.

Q. Would you state what you did and what you took into consideration in making your appraisal in 1954?

A. Well, we, of course, checked the lands; we used the maps furnished by the Bureau; we used the A.S.C. records in Chester and in Shelby. As I recall it, Mr. Kolstad loaned us his own A.S.C. records on all these lands, and we made use of those in determining the acreages, and, of course, we went out and inspected the lands, forty by forty, as Mr. Gau testified. In addition, why, of course, I checked back on my memory of sales in the Toole County area; and where I felt I was in need of further information, I checked with some of the best informed people in that area. For instance, as to irrigated land, there isn't very much irrigated land in Toole County, so I talked to the head of the Water Users Association in Valier. They have an 80,000-acre project over there. And as to land values, I relied principally on sales in the area that were as nearly comparable to these lands as I could find.

Q. You spent about how much time on the lands?

(Testimony of P. R. McHale.)

As Mr. Gau testified, you were out there with him and Mr. Koefud at [428] all times? A. Yes.

Q. And now, do you have an opinion today as to the fair market value of the Clarence Kolstad property, the entire ownership, before the taking as of May 24, 1955? A. I have.

Q. And you are employed by our office to come here today to testify, is that correct?

A. That is correct.

Q. I have had an exhibit marked Plaintiff's Exhibit 28. I wonder if you would state what that is, generally?

A. I would say that it is a summary of the appraisal that I have made, taken from notes that I made up myself.

Q. And it consists of three pages, of which each page pertains to one of the parcels in this lawsuit, is that right? A. That is correct.

Q. And you had it prepared, and the items in it you know to be correct and represent your opinion?

A. That is correct.

Q. Now, in order to save time and so you don't have to read all of the figures on here, Mr. McHale, I will ask you if you have an opinion of the fair market value of the C. A. Kolstad property; or Clarence Kolstad property before the taking, that is, fair market value as of May 24, 1955?

A. I do. [429]

Q. Would you state what that is?

A. \$252,557.63.

Q. Now, did you—would you tell me if you had

(Testimony of P. R. McHale.)

assigned to the different classifications of land a certain per acre value?      A. I did.

Q. Would you state what the classifications are, and the per acre value that you have assigned?

A. Do you want the acreages?

Q. No, I think if you would leave the acreages off and just give the per acre value for each classification.

A. For irrigable land, \$95 per acre; cultivated land, \$75 per acre; new crop land, \$60 per acre; upland tillable, \$40 per acre; river bottom, \$30 per acre; and upland grazing, \$12.50 per acre.

Q. Of course, on this exhibit, the first page, you have the number of acres of each classification you have, extending, of course, the figures so that the total value for each classification added together makes your opinion of the value of the whole?

A. That is correct.

Q. Now, do you have an opinion of the fair market value of the land remaining to Clarence Kolstad after the taking as of May 24, 1955?

A. I do. [430]

Q. Would you state what that total is?

A. \$63,623.75.

Q. And I notice there are three classifications of land left. Would you state what rate per acre you assigned to each of the classifications?

A. For the cultivated, \$65 per acre; for upland tillable land, \$30 per acre, and for the upland grazing, \$7.50 per acre.

Q. I notice you have reduced your per acre

(Testimony of P. R. McHale.)

value for each classification as compared to your before taking values?      A. That is correct.

Q. Would you explain why you have done that?

A. Well, that difference would represent the severance found, in my opinion.

Q. Explain that, please?

A. Well, from the taking and dividing the other acreages up and splitting it up, I felt that the owner was entitled to be compensated for that taking and the difference in the price is the amount I felt he was entitled to.

Q. Would another way to put it be to say you felt that as a result of the taking, the remaining property had been reduced in value?

A. That is correct.

Q. What is the difference between the before and after valuations for the Clarence Kolstad property? [431]      A. \$188,933.88.

Q. Now, do you have an opinion of the fair market value of the Alta Kolstad holdings, that is, the entire ownership before the taking as of May 24, 1955?      A. Yes.

Q. Would you state what that is?

A. \$181,724.63.

Q. Now, you have read that from page 2 of what is marked Plaintiff's Exhibit 28, and in addition, you have, I notice, itemized the number of acres, rate per acre of the classifications, together with the extended amounts?      A. That is correct.

Q. Now, the number of acres and the extended amounts, are they correct?



(Testimony of P. R. McHale.)

A. I would say yes.

Q. Now, in order to shorten it again, would you then state what the classifications are and the rate per acre you have assigned to each one?

A. For cultivated land, \$75 per acre; new crop land, \$60 per acre; for upland tillable, \$40 per acre; river bottom, \$30 per acre; upland grazing, \$12.50 per acre.

Q. Any improvements on this Alta Kolstad property? A. There were.

Q. What did they consist of, and what value did you assign?

A. Well, there was a house on the property, as I recall it, [432] a five room house. It was old but usable; and a barn, a garage, and some other out buildings, but those were the main factors in the appraisal.

Q. In your total valuation, did you include any value for those improvements?

A. I included \$3,550.

Q. Now, do you have an opinion of the fair market value as of the same date of the property remaining to Alta Kolstad after the taking?

A. I do.

Q. Would you state the classifications and the rate per acre you have assigned to each of those?

A. For the cultivated land, \$75 per acre; for upland tillable, \$40 per acre; for the upland grazing, \$7.50 per acre.

Q. I notice the per acre values you have as-

(Testimony of P. R. McHale.)

signed on the remaining lands are the same except for the grazing land. Would you state why you did not reduce the values after the taking in this case as you did in the Clarence Kolstad properties?

A. Well, in my opinion, the remaining unit of the cultivated and tillable were such that they were not damaged materially by the taking, and the grazing land was.

Q. I see, and you have reduced the value of the grazing by \$5.00 per acre as a result of the taking? [433]

A. That is correct.

Q. What is the value of the remaining lands after the taking, the total?

A. \$108,550.68.

Q. And the difference between the before and after value is what?

A. \$73,168.95.

Q. Now, turning to the joint ownership, Mr. McHale, do you have an opinion as to the fair market value of the joint ownership, the entire joint ownership as of May 24, 1955, before the taking in this case?

A. I do.

Q. State what that is?

A. \$229,180.13.

Q. And again on this third page of the exhibit you have been referring to, you have the number of acres listed on the left hand side, as well as the extended amounts at the rate per acre you have assigned, and are those figures correct as far as you are concerned?

A. As far as I know, they are correct.

Q. And would you state the classifications of the

(Testimony of P. R. McHale.)

lands as well as the per acre value you have assigned with reference to this joint property?

A. For the irrigable acreage, \$95 per acre; cultivated, \$75 per acre; river bottom, \$30 per acre, upland tillable, \$40 per [434] acre; and upland grazing, \$12.50 per acre.

Q. Now, do you have an opinion of the fair market value on the same date of the property remaining in the joint ownership after the taking?

A. I do.

Q. State what that is? A. \$102,877.38.

Q. Now, what classifications remain, and what values per acre do you feel was proper?

A. For the cultivated land, \$65 per acre; for the upland tillable, \$30 per acre; for the upland grazing, \$7.50 per acre.

Q. I notice you have reduced each of the per acre values in the remaining unit as compared to the whole unit. Would you state why you did that?

A. Well, it is severance, and the lands on the south side of the river are cut off, and in general I figured that the remaining acreage has been damaged to the extent of \$10 per acre on upland tillable, \$10 per acre on the cultivated, and \$5 on the grazing.

Q. What is the difference between the after value and the before value, please?

A. The difference is \$126,302.75.

Mr. Galles: The government offers in evidence Plaintiff's Exhibit 28. [435]

Mr. Wiggenghorn: No objection.

(Testimony of P. R. McHale.)

The Court: Admitted.

(Plaintiff's Exhibit 28, being the summary last above referred to, was here received in evidence.)

Mr. Galles: You may cross-examine.

### Cross-Examination

By Mr. Wiggenhorn:

Q. Mr. McHale, directing your attention to your tabulation here with respect to the Clarence A. Kolstad place, that is No. 28, do you have it before you there?

A. No, I do not, I have my notes, however.

Mr. Galles: I will hand him a typewritten copy, if that is agreeable since the original is being passed to the jury.

Q. Reading from your classifications and your values, will you follow me? The first item there for irrigable, you have a value of \$5,700, do you?

A. That is correct.

Q. And cultivated is \$156,112.50?

A. Correct.

Q. The new crop land is \$29,700? A. Yes.

Q. Upland tillable is \$23,200? A. Correct.

Q. The river bottom is \$31,830? [436]

A. That is correct.

Q. Upland grazing is \$11,515.13, right?

A. Correct.

Q. Now, I understood you to say, correct me



(Testimony of P. R. McHale.)

if I am wrong, that your appraisal of the entire Clarence A. Kolstad farm is \$252,567.63 before the taking?      A. That is correct.

Q. Well, Mr. McHale, will you get your pencil out and add those figures up and see if you didn't make an error?

A. There is something wrong there, counsel.

Q. What do you make it out to be now after you have added it again?

A. Let me just make one more check. \$258,-057.63.

Q. Yes, I agree with that. You had it \$252,-567.63?

A. That is what it says. I didn't type it, but I probably made the mistake myself.

Q. Did you do the addition yourself?

A. No—I added it.

Q. At any rate, you are ready to say now, instead of appraising this entire tract before the taking at 252 thousand, it is now 258 something, isn't that right?      A. Yes, I am.

Q. Do you want to make that correction on the exhibit, or I will ask counsel if he wishes to?

Mr. Galles: I was thinking it was possible he made a [437] typographical error.

Mr. Wiggernhorn: In order to save time, how would it be if counsel and the witness got together during a recess?

The Court: The question is, is it your opinion that the before taking value is \$252,000 or \$258,000, which is your opinion?

(Testimony of P. R. McHale.)

A. May I look at my notes, please?

The Court: Well, do you have an opinion on the total?

A. It is—I will correct it to \$258,057.63.

The Court: Why have you corrected it?

A. An error in the addition **there**.

The Court: What did you do, just take these individual items and add them up and say that is it?

A. That is apparently it.

The Court: Is that the way you did it?

A. Well, that is it, listed the different items and made a total.

Q. (By Mr. Wiggenhorn): I think what his Honor is directing your attention to, Mr. McHale, is this, and I want to know it, too. When you gave us that opinion, your opinion of the value of this parcel of land before the taking, are you arriving at that opinion by this method of adding up, getting in all the cents and so on, adding up these figures tabulated here as you have classified this land?

A. Yes. [438]

Q. Is that the way you arrived at your opinion of market value?           A. Yes.

Q. You didn't look at it as a whole, and after considering all the elements and facts, arrive at that figure?

A. In arriving at these different prices or classifications, why certainly I gave that consideration, as I think I have testified to, as to sales and viewing the land.

Q. I think it is almost evident, is it not, Mr.

(Testimony of P. R. McHale.)

McHale, actually when you come up with this precise figure down to 63 cents, you did really arrive at your final figure and thus your estimated opinion of value based upon the method you used here, which is adding up irrigable, cultivated, listing each of them separately and adding up the figures, and you made a mistake in your addition and arrived at \$252,000, which you now expressed as the value of the whole?      A. That is correct.

Q. You are ready to change it right now as soon as you find you didn't add right?

A. I am glad to do that.

Q. Could it be possible in your exhibit, when you carried out these figures, the totals for each classification, irrigable, cultivated and so on, you in turn had to do some arithmetic. You had to take the total number of acres and multiply it by value? [439]      A. That is true.

Q. I haven't had time to check those.

A. I have been an accountant for many years. I should have had it right.

Q. However, I do understand you to say that you did take into consideration other sales that were made in this vicinity and so on?      A. Yes.

Q. Did you take into consideration—I will ask you do you know about the sale of Gilbert to Leck?

A. Just by hearsay.

Q. Did you take that one into consideration?

A. No.

Q. Is it also true with respect to yourself, as with respect to Mr. Gau, as he testified a few min-

(Testimony of P. R. McHale.)

utes ago, that you were employed by the Bureau of Reclamation originally, along with Mr. Gau and Mr. Koefud to do this job of appraisal for the Bureau?      A. That was correct.

Q. That was in March, 1954, to start with, at least?      A. Correct.

Q. At that time, the three of you arrived at an appraisal and appraised the property as of the date of taking, did you not?      A. Yes. [440]

Q. And that appraisal that you and they arrived at was \$226,000 for all three units added together, wasn't it?

A. Well, I couldn't say that was the exact amount. I would say it was the approximate amount; I don't recollect; it was three years ago.

Mr. Wiggenhorn: That is all.

### Redirect Examination

By Mr. Galles:

Q. Mr. McHale, looking at your notes now, just so I am satisfied, does the exhibit correctly reflect what figures you have in your notes, so I know it was no typographical error between your notes and the final draft?

A. No, the typing is correct, it is the addition.

Q. All right, now, then, since you stated that you wanted your exhibit here to reflect what your opinion is, would you make the changes on this exhibit to reflect what you believe the fair market value is and make the proper subtraction then down below as to the difference, please?



(Testimony of P. R. McHale.)

(Witness does as requested.)

Q. Have you completed that? A. I have.

Q. Would you state now then what the before value is, the after value, and the difference?

A. The before value is \$258,057.63; the value of the [441] remaining unit, \$63,623.74, and the difference, \$194,433.88.

Mr. Galles: Very well.

The Court: Now, I understand that the exhibit has now been changed, but has your opinion been changed? Is it your opinion that the before value is \$258,057.63, or is it your opinion as you first stated it, \$252,567.63?

A. My opinion is that the before taking amount is \$258,057.63.

The Court: Was that arrived at independently? Has that always been your opinion?

A. Well, since—yes, that is the opinion. It was just simply a clerical error, your Honor.

The Court: Do your notes, the notes you made, do they reflect that you fixed the before valuation of \$258,000?

A. No, the notes are wrong.

The Court: Then, your exhibit was, or your opinion was just based upon the mathematical formula of adding up what you thought the separate valuations were in this case, is that right?

A. Yes, the components.

The Court: Very well, that is all. Any further questions?

Mr. Galles: No further questions.

(Witness excused.)

The Court: It is about time for the noon recess. I think maybe—what would you think of starting, say, at 1:30 this [442] afternoon and quitting a little early? Are you in favor of that? Let's recess then until 1:30. Court will stand in recess until 1:30.

(Jury admonished.)

(Noon recess.)

Mr. Galles: Just before we recessed for lunch, your Honor, the jury had a couple of exhibits they were looking at, and I would like to get them back to them.

The Court: Very well.

### JOE MEISSNER

called as a witness on behalf of plaintiff, being first duly sworn, testified as follows:

#### Direct Examination

By Mr. Galles:

Q. Will you state your name and where you live?

A. Joe Meissner from Chester, Montana.

Q. Do you live in Chester?

A. I live in Liberty County 17 and a half miles out of Chester.

Q. How long have you lived there?

A. All my life.

Q. What do you do?

(Testimony of Joe Meissner.)

A. Farm and ranch.

Q. That is wheat farming? A. Yes. [443]

Q. Is that winter or spring wheat?

A. Both.

Q. And you have some livestock? A. Yes.

Q. What kind? A. Herefords.

Q. Are you acquainted with the property involved in this action belonging to Clarence Kolstad, Mrs. Kolstad and to them jointly? A. Yes.

Q. How do you know about that property?

A. Well, I and my brothers, we farmed it for six years.

Q. From what year until when?

A. 1948 until 1953.

Q. And what arrangement did you have with Mr. Kolstad?

A. We paid him 15 cents an acre for the grazing land and one-quarter of the crop share.

Q. On the cultivated or wheat lands?

A. Yes.

Q. When was the first year you took a crop off the Kolstad property? A. 1948.

Q. And do you know what the average yield was in that year?

A. Around 24 bushels on the wheat.

Q. How many acres did you have in? [444]

A. It was around 800 acres.

Q. And had that been cultivated—

Mr. Wiggenhorn: I didn't hear his answer. How many acres?

(Testimony of Joe Meissner.)

Q. About how many acres, 800, is that what you said?  
A. Yes.

Q. That was land that had been cultivated and farmed on the place before you went on?

A. About 600 acres had been cultivated before, and the other 200, we prepared that in the spring.

Q. In the spring of 1948?  
A. Yes.

Q. And took a crop off that same fall on the new land that was broken?  
A. Yes.

Q. Did you break up any land on the Kolstad properties while you had them under lease?

A. Yes, we did.

Q. About how many acres?

A. It would be right around 3,000 acres.

Q. Could you identify the area in which the 600 acres were cultivated at the time you went on the property if you looked at an aerial photograph?

A. I could pretty close, yes.

Q. On what part of the Kolstad property was that located? [445]

A. That is what they call the Clarence Kolstad.

Q. I wonder, Mr. Meissner, if you would step to Exhibit No. 21 here and point out for the jury on this exhibit where the 600 acres were that you farmed that had previously been cultivated when you went on this place?

A. Right there (indicating)—no.

Q. In order to assist you, I might point out that these black solid lines are the exterior boundaries of the Clarence Kolstad property, so if you



(Testimony of Joe Meissner.)

had that under lease, it would be somewhere within those solid black lines.

A. How about this up here (indicating)?

Q. No, that according to the record so far——

The Court: I think, counsel, you had better let the witness identify it if he can recognize it from the map. Let him say what the boundaries are.

A. That piece right there (indicating).

Q. Now, you are pointing to the middle north portion of Section 5, is that right? What is your answer to that question? A. Yes.

Q. And does that piece contain about 600 acres?

A. No.

Q. Is there other property? Speak up so the reporter and jury and court can hear?

A. There would be some in this section here (indicating). [446]

Q. What section is that? A. Section 4.

Q. I see. All right, now, what portion did you break up in the spring of '48, if you can tell from this exhibit?

A. That section right there (indicating).

Q. What section number is that?

A. Section 9.

Q. All right, if you will resume the stand. Following that additional 200 acres that you broke up in the spring of 1948, did you break any other sod up during that year? A. Yes.

Q. How much?

A. Well, in all it would be about 1400 acres.

Q. Did you break up other lands in the subse-

(Testimony of Joe Meissner.)

quent years that you held the lease?           A. Yes.

Q. How much altogether from the time you first went on until you went off the property did you break up?

A. It would be approximately 3,000 acres.

Q. That was during the years 1948 through 1953, roughly?

A. 1948 through 1950, and then we didn't break any more after that.

Q. I see. You stated, I believe, that your average production the first year you were on the place in 1948 was 24 bushels to the acre? [447]

A. Yes.

Q. Do you know what your average production was in 1949?           A. Around 14 bushels.

Q. And that is considerably lower. How do you account for that low production in 1949?

A. Well, there was quite a lot of new land and it wasn't quite as wet a year as 1948.

Q. You said it wasn't quite as wet a year as in 1948, and also there was a lot of new land in 1949?

A. Yes.

Q. And does new land have a lower production than older land?

A. As a rule it has the first crop or two.

Q. The first crop or two. How about after that?

A. After that, it usually produces a little better than older land.

Q. Then, does that production remain constant, Mr. Meissner, assuming the same amount of rainfall and other conditions, as the land gets older and older?

(Testimony of Joe Meissner.)

A. Well, I would say pretty much so up until 20 years, if it is farmed correctly.

Q. Up to 20 years? A. Yes.

Q. What happens after that?

A. You notice a let down following that in the older ground. [448]

Q. All right. In 1950, you took a crop off the Kolstad property? A. Yes.

Q. Do you recall your average production in that year? A. It was around 14 bushels.

Q. And in 1951?

A. It was 17, around 17 bushels in 1951.

Q. 1952?

A. In 1952 it dropped down to around 13.

Q. And how do you account for that?

A. Well, it wasn't too good a year that year, it was dry, a little bit dry.

Q. It was dry? A. Yes.

Q. Then did you take a crop off in 1953?

A. Yes.

Q. What was the production in 1953?

A. It was around 22 bushels.

Q. Did you take a crop off after 1953?

A. No, that was the last crop we took off.

Q. Because your lease ended, is that right?

A. Yes.

Q. Do you know what the average is of those six years crops on a per acre basis that you took off these properties?

A. It is around 16 and a half bushels. [449]

Q. Was there any hail during any of those years?

(Testimony of Joe Meissner.)

A. Yes, we had a little hail one year.

Q. What year was that?

A. I think it was '52 we had some hail.

Q. How much damage did that cause to the crop in 1952?

A. Oh, there was 400 acres around 30 per cent.

Q. That was out of how many that you had in wheat that year?

A. That was 400 acres out of about 1800 we had in crop. There was around 30 per cent hail damage.

Q. Now, have you bought any property, Mr. Meissner, in the Tiber area, and I will confine it to Cottonwood Creek on the east and Highway 2 or the Great Northern Railroad on the north, and half way between Chester and Shelby on the West, and the Marias River on the south? A. No.

Q. You haven't bought any property around Cottonwood Creek? A. Yes.

Q. Where is that, how far from Cottonwood Creek? A. It is about two miles east.

Q. I see, it is just outside the Cottonwood Creek area? A. Yes.

Q. When did you buy that property?

A. We settled the deal up last spring in March.

Q. That was in 1956? [450] A. Yes.

Q. What was the first part of your answer, I didn't quite understand it?

A. We closed the deal in March, 1956.

Q. I see. Had negotiations been on before that?

A. Yes, a year before we had negotiated a kind of contract on it.



(Testimony of Joe Meissner.)

Q. You had a contract the year before. Was that contract executed? A. No.

Q. When you closed the deal, were the terms different than the contract?

A. No, they were the same.

Q. Then, as I understand it, you agreed on the price the year before, and then paid that price a year later when you closed the deal?

A. That's right.

Q. Was that a cash deal? A. Yes.

Q. What kind of land was involved in that purchase?

A. Well, part of it was land you could farm, farm land, tillable land part of it was.

Q. Part of it was tillable land?

A. And the balance was grazing.

Q. How much of it was tillable, Mr. [451] Meissner?

A. Approximately 2700 acres.

Q. And what was the total acreage in the farm?

A. 3136 acres.

Q. In buying that property, did you have an agreement with the former owner as to the per acre price to be paid for tillable and the per acre price to be paid for the grazing? A. Yes.

Q. What was that?

A. On the grazing land it was \$10.

Mr. Wiggernhorn: You are asking him to price the land?

Mr. Galles: Per acre, yes.

(Testimony of Joe Meissner.)

Mr. Wiggenhorn: May I ask him a couple of questions before we go any further?

The Court: Yes.

Mr. Wiggenhorn: I understood you to say, Mr. Meissner, this place you bought was east of Cottonwood Creek? A. Yes.

Mr. Wiggenhorn: Do you recognize that land lying to the east of Cottonwood Creek is not of the same quality, not as good land as land in the area the Kolstad places are?

Mr. Galles: I will object to that question. It is cross-examination rather than the purpose for which I thought counsel was going to inquire. I will lay a little further foundation.

The Court: I think you had better. You haven't yet laid the [452] foundation that it was comparable.

Mr. Galles: I thought if counsel didn't object I could do it without taking that time.

Q. (By Mr. Galles): How does the land compare that you bought near Cottonwood Creek with the land you farmed of the Kolstads. I would like to confine that to the tillable lands.

A. Well, I can't see that there would be much difference, it is all pretty good farm land, it would class about the same.

Q. You are familiar, of course, with the property you bought, and you were on the Kolstad property for six years? A. Yes.

Q. Is it the same type of soil?

A. Yes, I would say it is pretty much the same.

(Testimony of Joe Meissner.)

Q. How about the terrain, is it as level or not as level as the tillable land you broke up in the Kolstad properties?

A. This is little leveler land and in little bigger blocks that we bought.

Q. You say the land you bought was a little leveler and a little bigger box?

A. Little bigger blocks.

Q. Well, now, what agreement, and what did you pay per acre for the tillable land that you bought in 1955?

A. We paid \$40 for the tillable.

Q. And how much for the grazing? [453]

A. \$10 for the grazing.

Q. Were there any other considerations that went into that price, were there any improvements on the property?

A. No.

Q. No improvements, and who did you buy that from?

A. From John Brinkman.

Q. He is not related to you in anyway, is he?

A. No.

Mr. Galles: You may examine.

#### Cross-Examination

By Mr. Wiggenhorn:

Q. With respect to the yields that you testified to in the respective years 1949, 1950, 1951, 1952 and 1953 while you were farming the Kolstad farms, I notice you had no memorandum before you and nothing to refresh your memory. Were you testifying entirely by memory?

(Testimony of Joe Meissner.)

A. No, we done some figuring before we set those yields.

Q. You did some figuring before you set what?

A. Those yields.

Q. You mean before you came into the court-room here?

A. No, sometime ago we checked it over.

Q. How long ago?

A. It has been a couple of years now.

Q. You had the figure a couple years ago, you mean? [454]

A. Yes.

Q. What was your purpose, your object, in figuring it a couple of years ago?

A. Well, the government appraisers——

Q. What?

A. The government appraisers wanted to get an idea of what it yielded, so we figured it out then.

Q. At that time the Bureau of Reclamation men had been to see you and were checking with you and you were giving them the figures?

A. Yes.

Q. What records did you consult when you made those figures up for the Bureau men?

A. Well, we had a lot of those figures because we had given one-fourth of the crop——

Q. I can't hear you very well, Mr. Meissner, I am sorry.

A. We had a lot of the figures because we had given one-fourth of the crop to Mr. Kolstad.

Q. You had been giving what to Mr. Kolstad?

A. One-fourth of the crop.

Q. Had you preserved them from year to year?



(Testimony of Joe Meissner.)

A. Yes, we still have some.

Q. What kind of records did you keep? Of what did they consist?

A. Of these elevator tickets you get when you take a load [455] of grain in. That is a pretty good record.

Q. You still have such tickets? A. Yes.

Q. Do you have full sets of them for each year?

A. Some years we have.

Q. What kind of receptacle do you keep them in to distinguish one year from another?

A. They have dates on them, so you can't go wrong.

Q. You were farming some other land at the time you were farming the Kolstad places?

A. Yes, our own place.

Q. How many acres did you have on your own place of cultivated land?

A. Around 5,000 acres.

Q. Was it just one brother, or two of you?

A. Six of us.

Q. Six of you were all farming in partnership together? A. Right.

Q. You farmed the Kolstad places, plus your own place of about 5,000 acres cultivated?

Mr. Galles: State what your answer is rather than nodding your head so we can get it into the record, please. A. Yes.

Q. Do you likewise have the records, these elevator tickets for the 5,000 acres of your own lands you were farming during [456] that period of time?

(Testimony of Joe Meissner.)

A. No.

Q. Would you be able to tell me why you preserved the tickets for the Kolstad farms, but not for your own?

A. Well, our own farm is pretty much our own. We didn't have to give a crop share, and on the Kolstad farm, we had to give him a crop share.

Q. I might ask you now, do you have the tickets with you? A. I have some of them.

Q. Here in the courtroom? A. No.

Q. Here in Havre?

A. Yes, I have got some here.

Q. Have you consulted them since you have been here? A. No.

Q. You didn't bring them here to the courtroom? A. No.

Q. And you think they are complete. Do they comprise all the tickets for all the sales that were made off the Kolstad place?

A. No, I would have to go through them and check them over. They are probably mixed up a little.

Q. Please talk a little plainer. I can't hear you too well.

The Court: Counsel, maybe you should move closer.

Mr. Wiggenhorn: It isn't a matter of not being able to [457] hear. Maybe the reporter can read the answer.

(Last answer read back by Reporter.)

Q. Well, do you think you have them complete

(Testimony of Joe Meissner.)

for the five years you were farming the Kolstad place?      A. No, I don't.

Q. Well, of course, you have given us the average yield. How do you go about figuring the average yield?

A. Well, you just figure what it produced each year and then add them up and divide by the total acres.

Q. To find the total production, that would be adding up all the tickets, wouldn't it?

A. Yes.

Q. That is the total bushels shown by each ticket added all up and divide that by the number of acres that had been seeded and harvested for that year, would you not?      A. Yes.

Q. That would give you the average yield, right?

A. Say that again.

Q. I don't want to deceive you the least bit, Mr. Meissner. You add up all the bushels you raised, as shown by the tickets for that given year, do you not?      A. Yes.

Q. Then you determine how many acres you have harvested those bushels from, do you not?

A. Yes. [458]

Q. You divide the total number of acres into the total amount of bushels of wheat?

A. Right.

Q. You do then have to know what the total number of bushels raised were, don't you?

A. Yes, you would.

Q. And you have told me just now you don't have all the tickets for each year?

(Testimony of Joe Meissner.)

A. I don't have them here. I could find them if it had to be, but it would be quite a job.

Q. When you say here, just tell us what you mean, here in Havre at the hotel room?

A. I don't have them here in Havre, no.

Q. You don't have them at all here in Havre, or not just the full amount?

A. Not the full amount.

Q. How did you select part of them, by years, or just take a handful of them?

A. No, you have to have each year separate.

Q. When you tell me you don't have them all here, by which I understand you mean here in Havre, how did you happen to bring those you have here? What is the significance of those you have here and those you didn't bring? Do I make myself clear? A. No. [459]

The Court: Why did you bring some to Havre?

A. Well, I had some that I figured were about right in case I had to have them, that is, they were all of one year in one bunch, and I brought some of them.

The Court: Why didn't you bring them all?

A. I would have to hunt them all up.

The Court: You don't know whether the ones you have here are all of the tickets for any one year, then?

A. No, I wouldn't know for sure.

Q. (By Mr. Wiggernhorn): If you were given an opportunity to go to the hotel room or wherever you have them to bring the tickets here, you would

(Testimony of Joe Meissner.)

not be able to bring them all anyway, would you?

A. No.

Q. Would you be able to bring us all for one given year?

A. Well, I believe I could for one given year.

Q. Do you have that year in mind now as you sit here?      A. Yes.

Q. Which year would that be?      A. 1952.

Q. That would be the second to the last year?

A. Yes.

Q. If that opportunity is given to you to produce the 1952 tickets, would you be able to produce them reasonably this afternoon after you are excused from the witness stand? [460]      A. Yes.

Q. Did you keep any book record of your production, your wheat production by bushels from the Kolstad places?      A. No.

Q. And all you have, then, in the way of anything to prove the figures you have given us from your head just now are those tickets you have referred to?      A. Yes.

Q. And as to those, the only ones immediately available, at least, would be the 1952 tickets?

A. Yes.

Q. And as I understand you, you have only the tickets from the wheat produced from the Kolstad farms and none of those from your own 5,000 acres, you haven't kept those at all?      A. No.

Q. I understood as well from you, Mr. Meissner, your purpose in keeping these tickets was to show to the Kolstads and prove to them the amount of



(Testimony of Joe Meissner.)

bushels that had been raised for the purpose of determining their one-quarter rental, but that having been once delivered and paid, was there any further purpose for preserving the tickets?      A. No.

Q. You might just as well have destroyed them?

A. We just kept them from curiosity to see what we raised.

Q. But with respect to your own farms, with respect to wheat [461] sent to the elevator, you got similar tickets?      A. Yes.

Q. You took them home in each instance, didn't you?      A. Yes.

Q. You probably kept them until the end of the harvest, or did you throw them away immediately?

A. No, we usually keep them and figure up the wheat when we sell it, figure up the bushels of wheat.

Q. And then throw them away?

A. We don't throw them away, we keep them around, but I don't have them now.

Q. You don't have them any more as I understand?

A. They are at home, but not kept in one particular place.

Q. You have been careful to preserve those from the Kolstad place insofar as you have preserved them, as I understand that?      A. Yes.

Q. Did you have any anticipation at the time back in 1949, for example—you have them for 1949, do you?      A. I could find them.

(Testimony of Joe Meissner.)

Q. When you had them in 1949, did you anticipate at that time, having settled with the Kolstads, that you would ever again have use for them?

A. No.

Q. You are sure you haven't confused the tickets you have [462] for the wheat harvested from the Kolstad places with those harvested from your own 5,000 acres?

A. Well, when we hauled the wheat off their place, we always had it marked "Meissner and Kolstad," and when we hauled the wheat off our own place, it was marked "Meissner."

Q. Yes, I appreciate you marked them. What I am interested in is whether or not when you were figuring the averages for each given year you might have confused them?

A. I wouldn't say it is impossible. One might have slipped in or out.

Q. You also gave us, in addition to the average for each year, you gave us the average for the five years, the average production per acre, did you not?

A. Six years, isn't it?

Q. Well, six years. I thought it was five. You had a crop in 1948, too?

A. Yes.

Q. Well, for the six years, you also figured the average production for that full period, did you not, per acre?

A. Yes.

Q. We just went through the process of how you figured the average for each year. When you figured the average for the six years, did you take the averages for each year and then proceed to average those

(Testimony of Joe Meissner.)

to determine, was it 16 bushels you stated as the average? [463]

A. Around 16 and a half.

Q. When you figured the 16 and a half, did you arrive at that by taking the averages for the six years and then averaging those out, or how did you do it?

A. Totaled the six years and then divided.

Q. I want to be sure I know what you mean, totaled the six year average or totaled the bushels for the six years?

A. Totaled the bushels and totaled the acres and then divided.

Q. You totaled the bushels and totaled the acres. You didn't have the same number of acres cultivated each year, did you, they were not constant?

A. No, they varied.

Q. You kept on building up and putting more land into cultivation? A. Yes.

Q. Some of which was new land, because you only started with, was it six or eight hundred acres?

A. Around 800 acres.

Q. But 200 of that was new, too? A. Yes.

Q. So you really started with 600 acres, and all of the rest of your acres—you broke up 3,000 more—was new land?

A. There was some other stubble land on the place we summer fallowed in 1948. [464]

Q. At least 3,000 acres of it was new land?

A. Yes.

(Testimony of Joe Meissner.)

Q. That, as I understood you to say, does not produce so well for the first few years?

A. As a rule it does not.

Q. When did you do the computing to arrive at the 16 and a half bushels for the six years?

A. We done it every fall.

Q. When did you do the six years? You couldn't do that every fall because you had to wait until the finish.

A. For the total, it was two years ago.

Q. Was that done for your own information, or again for the Bureau of Reclamation?

A. It was partly for our own and the Bureau of Reclamation.

Mr. Wiggenhorn: No further cross-examination.

Mr. Galles: That is all, thank you.

The Court: Call the next witness.

Mr. Galles: I wonder if this witness may be excused, it is agreeable with counsel.

The Court: Very well, he may be excused.

Mr. Wiggenhorn: I would like to ask leave of court—whether he would be agreeable to getting his 1952 tickets and being recalled?

The Court: Mr. Meissner, will you return to the room or wherever you have the elevator tickets you testified about and [465] bring all you have with you back to court right away?

The Witness: Yes.

The Court: Very well.

(Witness excused.)

THOMAS VIRDEN

called as a witness on behalf of plaintiff, being first duly sworn, testified as follows:

Direct Examination

By Mr. Galles:

Q. State your name and where you live?

A. Thomas Virden; I reside at Billings, Montana.

Q. What do you do there?

A. I am employed by the Bureau of Reclamation.

Q. In what capacity? A. Land Appraiser.

Q. How long have you been so employed?

A. Since 1948.

Q. How old are you, Mr. Virden?

A. 58 years old.

Q. Where were you born, raised and schooled?

A. I was born in Converse County, Wyoming, I grew up in Converse County, I attended high school in Converse County, and I attended Iowa State College at Ames, Iowa.

Q. Following your formal education, what did you do? [466]

A. I didn't understand your question.

Q. Following your formal education, what did you do?

A. I was born and raised on a ranch on which I still resided after I had completed my education, and I continued there with my father until he disposed of that property, which was in 1919. After



(Testimony of Thomas Virden.)

that time, I was employed in a bank, and I worked in that institution until 1927. I then worked for the State of Wyoming, State Department of Agriculture for four years. At the end of that four years, I purchased a ranch property. During that time I was still connected with the bank which I had worked in and was a stockholder and director in that bank.

Q. What kind of a ranch did you purchase?

A. It was a livestock ranch, irrigated land raising hay, grain, cattle and sheep.

Q. How much banking experience and ranching experience have you had?

A. Well, my banking experience would be over a period from 1923 until 1946; it would be 23 years. The ranching experience would be from, that is, as the owner and operator of a ranch—I had had previous experience as a boy—but as an owner-operator, that experience would be from 1926 until 1947, which would be 21 years.

Q. In 1946, did you sell your ranch, then?

A. 1947, I sold that ranch. [467]

Q. Then what did you do?

A. I bought another ranch in Sheridan County, Wyoming.

Q. Did you operate that?

A. I operated that ranch for one year and disposed of it.

Q. By selling?                      A. Yes, sir.

Q. Then what did you do?

(Testimony of Thomas Virden.)

A. Then I came to Billings and obtained a job with the Bureau of Reclamation as a land appraiser.

Q. That was in 1948? A. That's right.

Q. And you have been employed by them ever since? A. Yes, I have.

Q. What type of land appraisals have you done for the Bureau of Reclamation?

A. Well, in our program, we acquire land in fee title and easements on land for the construction and maintenance of transmission lines, canals, reservoir storage areas, power station sites.

Q. And how many acres, if you know, or how many appraisals have you made for the Bureau of Reclamation?

A. I don't know just how many by number of appraisals I have made for the Bureau of Reclamation, but if I may refer to my notes, please.

Q. Can you remember without referring to [468] them?

A. Yes, I can remember, approximately, without referring to them. I have appraised about 100,000 acres of land in Montana; I have appraised about 300,000 acres of land in Wyoming, and 70,000 acres in South Dakota.

Q. And was that all types of land?

A. Yes, it was.

Q. Any city property involved? A. No.

Q. Have you qualified as an expert in any court?

A. Yes, I have.

Q. In how many?

A. South Dakota, Wyoming and Montana.

(Testimony of Thomas Virden.)

Q. And you have qualified in this court previously as an expert? A. Yes, I have.

Q. Are you acquainted with the Kolstad properties involved in this action, the three separate parcels? A. Yes, I am.

Q. When did you first become acquainted with them?

A. Well, generally, I became acquainted with them or with this area in 1949. I appraised a right-of-way for a transmission line from Shelby, Montana, to Havre, Montana, a distance of 106 miles.

Q. And then when did you—you didn't make an appraisal of the whole property at that time? [469]

A. No, I said I just became generally acquainted with the area, not with this particular property, just with this area. That was my first work in the Chester area, this easement across that area for this transmission line. Then, in 1952, I made some appraisals in the storage area of the Tiber Dam; then, again in 1954, was the first time that I remember distinctly that I was on Mr. Clarence Kolstad's property. I was on there in 1954, in the month of May.

Q. What did you do then?

A. Well, I went over that area at that time for the purpose of becoming acquainted with the terrain of the land and the operations of the land, the location of the streams and the type of soil; also the location of the improvements, the fences, and just to become generally acquainted with the property. Then I later—not this same time, but some days

(Testimony of Thomas Virden.)

later, I went back on the property after I had prepared a map more or less in outline of the lake and the legal description of the property and oriented myself on the map by making notations on the map of the different physical characteristics of the land.

Q. And then what did you do?

A. I don't remember then if I was—there was so many different times that I was in this area, but I did make a map of the property at that time and checked the map on the property. Shortly after that I interviewed Joe and Ernest [470] Meissner, who were at that time, leasing the property. I interviewed them for the purpose of obtaining from them all the information I could about their operation on the property. I also made a check—at that time I believed it was the Production Marketing Office, the P.M.A. office—to determine what I could from the record that they had for wheat production on this land, and the total amount of acreage of crop land which had been determined by them.

Q. That was the P.M.A. office where?

A. The P.M.A. office in Chester.

Q. You checked the records with reference to the Kolstad property?

A. That's right. Then, afterwards, I returned and did some more work on this property. I interviewed the Meissner boys again, and obtained from them their estimate of their production of wheat on the property up to that date.

Q. Now, were you there when they made that estimate or calculation?

(Testimony of Thomas Virden.)

A. When I was there, they had elevator tickets, and as I recall, some other records which they had kept, and that was their collective opinion, the figures they gave to me was their collective opinion of the yield that they obtained from this property for the years up to that time.

Q. You heard him testify. Did he testify today to the same figures as he gave you when you were there in 1954? [471]      A. Yes, I think so.

Q. All right, then what did you do, Mr. Virden?

A. I wasn't back to do any work in this area until in December of 1955. I came back here, and to refresh my memory on this property and other properties, I went out over the land and observed what I would say was the operation of the property since the last time I had viewed it, and also in addition, any other lands that might have been put under cultivation since I had been there, since the last time I had been there.

Q. Then what?

A. I did find that there had been additional land put under cultivation since the last time I had been on the property. I at that time made a new map of the property, which I developed from an aerial photograph by taking a tracing from the aerial photograph. I took that to the field and very carefully went over all the land and developed this tracing from the aerial photograph to correspond with what I found to be true in the field.

Q. Was that about the extent of your field work?

A. No, at that time I spent about a week in the



(Testimony of Thomas Virden.)

field around the Chester area in Liberty County, and also in Toole County, checking sales.

Q. What sales did you check, or how did you check them?

A. Well, to begin with, through another employee of the [472] Bureau of Reclamation, he had obtained from the County records in both Toole County and Liberty County all of the land sales which had transpired in those two counties since 1952. That, I believe, amounted to about 140 sales.

Q. Did you look at all those sales?

A. No, I did not. I went through those sales and I sorted them out. There were sales that I, of course, knew would not be comparable, then for other reasons there were sales that had not been completed, and there were sales that had been made under different circumstances, between relatives and such like, and I did not consider any of those sales. I did try to find the largest sales of land with an appreciable amount of tillable land involved, and those were the sales which I inspected.

Q. How many sales did you finally end up with that you gave consideration to?

A. I finally gave consideration to 10 sales, six in Liberty County and four in Toole County.

Q. Were those large sales or small sales with regard to size?

A. They were the 10 largest sales which included an appreciable amount of wheat land which I was able to find from a complete list of all sales that had transpired in the two counties since 1952.

(Testimony of Thomas Virden.)

Q. Up until what date? [473]

A. Up into 1955. There was some sales, some of these sales were made in 1955.

Q. Were any of them made after the date of taking, May 24, 1955?

A. Can I refer to my notes? I am not sure, I don't think so. If so, the date was very, very close.

Q. All right. Did you do anything else, then, in connection with your appraisal of this land?

A. Yes. After checking the sales data, I prepared a preliminary appraisal on the land. I was not entirely satisfied with the information which I had on some of these sales, and I had the opportunity of being back here and returning and re-checking some of those sales and becoming a little better acquainted with them. Also, if I may go back, in 1954, I made quite an extensive inquiry from real estate agents in Great Falls and here in Havre.

Q. That was with reference to what?

A. That was with reference to land, to our program on the acquisition of land in the Tiber area. That is fundamentally the reason why I did that, but the information I received, of course, was for this general area in Liberty and Toole Counties.

Q. With the idea of determining what kind of value?

A. Well, with the idea of determining a fair market value of this land, based on their [474] opinion.

Q. Now, Mr. Virden, I assume that you have an

(Testimony of Thomas Virden.)

opinion of the fair market value as of May 24, 1955, of these three parcels of land involved in this action?

A. Yes, I have.

Q. I hand you an exhibit marked Exhibit 29, consisting of three pages, and ask you to state generally what this is?

A. This is a copy of my estimate of the fair market value of the entire unit, and likewise of the remaining unit which, when subtracted from the value of the entire unit, would give the fair market value which has been given by me to the three different parcels of land.

Q. Each page representing the different ownership involved in this action?

A. Yes, I might state these have been prepared by me since January 1st, when it developed that this property was to be appraised in three separate parcels.

Q. When working on it prior to that time, you worked on it as one ownership and one piece of property?

A. That's right.

Q. Since last month, you developed these figures upon the basis that there are three parcels involved?

A. Yes, sir.

Q. What is your opinion of the fair market value of the property standing in the name of Clarence A. Kolstad before [475] the taking, fair market value as of May 24, 1955?

A. \$213,639.60.

Q. And without reading all of the number of acres and the extended price, would you state the

(Testimony of Thomas Virden.)

classifications and the value per acre for each classification that you assigned?

A. Irrigable crop land—the value which I will repeat is the per acre value—\$100; old crop land, \$65; new crop land, \$40; bottom land, \$30; upland tillable, \$25; upland grazing, \$10.

Q. Now, you have on this exhibit on the first page the number of acres involved for each classification, as well as an extension of the number of acres at the rate or price per acre, giving an extended summation over on the right-hand side?

A. I do.

Q. And that all totals to the figure you gave in the first instance as the value before taking?

A. Yes, sir.

Q. Now, do you have an opinion of the value of the Clarence Kolstad property remaining after the taking, the fair market value as of May 24, 1955?

A. Yes.

Q. Would you state what that is?

A. \$58,030.50.

Q. Now, again, with just giving the classification and the [476] rate per acre, would you state what is on the exhibit?

A. The classification, old crop land, \$65 per acre, upland tillable, \$25; upland grazing, \$8; other grazing, \$1.

Q. Now, your per-acre values on the crop land and tillable land is the same as first assigned, isn't it?

A. Yes, it is.

Q. But your after value on the grazing and cer-

(Testimony of Thomas Virden.)

tain other grazing is reduced? A. Yes, sir.

Q. Would you state how much it has been reduced and for what reason?

A. On 373.5 acres, the grazing has been reduced \$2 per acre for the reason that this block of grazing is not all contiguous; it has been broke into smaller tracts.

Q. And then you have another portion of grazing land which you have assigned a different value?

A. Yes, I do, 120 acres at \$1 per acre.

Q. Why did you assign that \$1 value?

A. There is one parcel of 80 acres south of the Marias River, I don't recall the section there now, and another parcel of 40 acres up in the northwest part there that have been entirely isolated from the remaining ownership by the taking.

Q. Can you identify those on this exhibit No. 24?

A. Yes, sir, the southeast quarter of the southeast quarter [477] of 20, and the southwest quarter of the southwest quarter of 21.

Q. Would you point to that land?

A. Yes, this 40, and this 40, and also—that is in one township, this is another township, and it would be the southeast quarter of the southeast quarter, Section 31, up here (indicating).

Q. Now, you have pointed to the portion at the northwest end of the largest tract shown on this exhibit which is outside of the taking area?

A. That's right.

Q. Now, with reference to the next ownership—I believe that is the Alta Kolstad property—do you



(Testimony of Thomas Virden.)

have an opinion as to the fair market value as of May 24, 1955, of her entire ownership before the taking?       A. Yes, I do.

Q. Would you state what that is?

A. \$150,001.20.

Q. And again without reading the number of acres involved, would you give the classification and the rate per acre you have assigned to it?

A. Old crop land, \$65; new crop land, \$40; bottom land, \$30; upland tillable, \$25; upland grazing, \$10.

Q. Do you have an opinion of the tract remaining to Alta Kolstad, after the taking, that is, the fair market value as [478] of May 24, 1955?

A. I have.

Q. State what that is, please?

A. \$90,300.22.

Q. And the per acre values assigned the various classification are what?

A. Old crop land, \$65—we have a typographical error here—this should be new crop—no, I beg your pardon, this is correct, a separate tract of old crop land, \$55.

Q. Now, you have two types of old crop land; one at \$65 and one at \$55 in the remaining tract?

A. That's right. Upland tillable, \$25; upland grazing, \$8, and one isolated 40 at \$1 per acre.

Q. Now, would you point out where the two old crop land tracts are that you have assigned a difference of \$10 an acre to, and the isolated 40 acres of grazing, as compared to the remaining grazing?

(Testimony of Thomas Virden.)

A. The isolated 40 of grazing is this 40 right here (indicating), which I think is the extreme east side of the ownership.

Q. You are referring to Plaintiff's Exhibit 25, and pointing to the extreme east colored portion of the map?

A. That's right. The old crop land which I valued at the same price is this crop land within the taking over here, which involves all of this which is colored blue inside of [479] the dense black line, the heavy black line. The crop land which I referred to at \$55 per acre is the crop land outside of the heavy black line across on the opposite side of Willow Creek and to the south and west of Willow Creek (indicating).

Q. It is isolated from the other remaining tracts?

A. Yes, the water backs up right in here (indicating). Counsel, I misspoke myself where I said inside the heavy black line. It would be outside of the heavy black line. That land, this, and this, and this (indicating).

Q. Now, with reference to—pardon me—strike that, please. What is the difference between the before and after values, Mr. Virden?

A. \$59,700.98.

Q. Do you have an opinion of the fair market value of the Clarence Kolstad and Alta Kolstad property held jointly as of May 24, 1955, before the time of taking?

A. Yes, I have.

Q. What is that? A. \$204,347.10.

Q. And without giving the number of acres,

(Testimony of Thomas Virden.)

what classifications and per acre value did you assign?

A. Irrigable crop land, \$100 per acre; old crop land, \$65 per acre; new crop land, \$40; bottom land, \$30; upland tillable, \$25; upland grazing, \$10. [480]

Q. Any improvements on this property?

A. Yes, there was.

Q. What value did you assign to the improvements? A. \$4,110.

Q. Now, do you have an opinion of the fair market value as of May 24, 1955, of the land remaining to the Kolstads in the joint ownership?

A. Yes, I do.

Q. State what that is? A. \$101,749.20.

Q. And the classifications and per acre value?

A. Old crop land, \$65; upland tillable, \$25; upland grazing, \$8.

Q. Now, you have just made a reduction of \$2 in the grazing and the other classifications remain the same, is that correct? A. That's right.

Q. Why do you reduce the grazing in this joint ownership?

A. For the same reason that I did on the other parcels, due to the fact that it is more or less segregated now, and not quite as usable as it was before.

Q. What is the difference between the before and after values you have given?

A. \$102,597.90.

Q. Now, the other figures that you have on this exhibit, Mr. [481] Virden, the number of acres, and

(Testimony of Thomas Virden.)

the extended price, and the other information, was that prepared by you or under your supervision?

A. It was all prepared by myself.

Q. And you know the other figures to be correct without reciting for the record each one?

A. I trust they are.

Mr. Galles: Offer in evidence Plaintiff's Exhibit 29.

Mr. Schiltz: No objection.

The Court: Very well, it is admitted.

(Plaintiff's Exhibit 29, being the summation sheets above referred to, was here received in evidence.)

Q. Now, in arriving at those figures, Mr. Virden, how did you arrive at the per acre values you have assigned to the various classifications?

A. Well, I arrived at the per acre value of the wheat land from my opinion of the market value which I found in the 10 sales which I selected as being in many respects representative of this property, or similar to this property, I would say.

Q. And the other values?

A. The other values were determined from sales which I had knowledge of for similar types of land, and from the productivity or capacity of the irrigable land and the bottom lands. [482]

Mr. Galles: You may examine.

#### Cross-Examination

By Mr. Wiggernhorn:

Q. With respect to these sales, you said you took

(Testimony of Thomas Virden.)

10 into consideration. Do I understand that none of them were sales occurring after the date of taking?

A. I don't think I gave a definite answer to that. If I may, shall I check?

Q. The question was asked you, but there was no answer on it. You say you can check on it right away?

A. Yes. No, there were none after. There was one the day before that, but none after.

Q. Does the Bureau of Reclamation follow any sort of policy in that regard about not considering any sales after the date of taking? Are you instructed to do that?

A. No, sir, we are not. We do consider sales that are made reasonably soon after the date of taking.

Q. When and where was it you talked to the Meissners?

A. I talked to them at their ranch.

Q. At their ranch? A. Yes, sir.

Q. What year was it?

A. The first time I talked to them was in May, 1954. I believe the second time was November, 1954. I am not [483] positive of that date, but I believe it is november, 1954.

Q. You went to them to get production records, is that what you went to see them for?

A. It was one of the things I went to see them for.

Q. Did you ever go to Mr. Kolstad, himself, to get his production records?

A. No, sir I never.



(Testimony of Thomas Virden.)

Q. Never made any effort to. I notice on your Exhibit 29, your tabulation, you make a differential, I think it is uniform for the three places, in your value for old crop lands over new crop lands, of \$25, that is, \$65 for old crop land and \$40 for new, is that true? A. That's right.

Q. You justify that by the fact that new crop land doesn't produce so well?

A. That's right.

Q. You know something about farming, I understand, you have been farming yourself, but you were not probably a wheat raiser, though; how about that?

A. No, not for myself, I never raised any wheat.

Q. Your contact and experience with the appraisal of wheat land has been entirely for the Bureau of Reclamation? A. Yes.

Q. That has been in recent years, because you told us you started working for them in 1948? [484]

A. Yes.

Q. Do you, in the experience you have had in the eight years since working for the Bureau of Reclamation, do you know it to be a fact that it takes only a few years—Mr. Meissner, himself, testified to it a minute ago—before new crop lands are as productive as old, after they once have been in production? A. Yes, I understand.

Q. But you make a \$25 differential in value?

A. Yes.

Q. Were you valuing it only for the matter of the crop produced in that year?

(Testimony of Thomas Virden.)

A. No, I was valuing it for land as of May 24, 1955. This land which we referred to here was plowed in November, or in the fall of 1954. There was in the combined places, there was——

Q. Let's not get confused. I would rather you didn't combine them. Let's take each place by itself.

A. On the Alta A. Kolstad, there was 256 acres of new crop land, and that was land which had more slope. I don't think that the soil was quite as good, and there was some of that land that showed evidence of being somewhat stony. Now, I was on that land this fall, and my opinion was more or less arrived at at that time, and I noticed that the stubble was considerably shorter on that land than it [485] naturally would have been because the crop harvested there this year was the first crop that had been harvested off of that land.

Q. It is my conclusion inevitably, then, Mr. Virden, that it wasn't alone because of its being new crop land that you made the price reduction of \$25 per acre, but because of other characteristics such as you have mentioned, is that right?

A. That's right.

Q. Even though it had been old crop land, you would have appraised it at a lower figure because of its being stony, rougher and sloping?

A. If it were characteristic, it would bring it to your attention as being different from the other crop land, yes, you would.

Q. With respect to the Alta Kolstad place, you

(Testimony of Thomas Virden.)

appraised it, as you did in the others, the before value of the old crop land at \$65 an acre?

A. Yes, sir.

Q. Then, I understand you reduced that value by \$10 for the old crop land after the taking?

A. That's right.

Q. I call your attention to the fact that before the taking, you have classified 1,523.5 acres as old crop land, which you ascribed this \$65 an acre value to, while after [486] the take, there are only 267 acres in this one parcel of old crop land that you put a \$55 value to, I think you told us, but on her farm, that reduction of \$10 was due to the fact of that size of 267 being a small unit?

A. No, it was not.

Q. What was the reason?

A. The reason was it was isolated from the other property by the land which is being taken.

Q. Don't you make any distinction at all as to the size of the units in valuing crop land?

A. That could be considered in this \$10 reduction.

Q. And you think there should be no greater differential, no greater difference in value than \$10 for a 267 acre tract?

A. I think I have made a liberal allowance.

Q. You think 267 acres can be operated as an economic unit?

A. I didn't say it could.

Q. Well, do you think so?

A. You mean just 267 acres and no more?

Q. That's right, 267 acres and no more.

A. Not dependent just entirely on the 267 acres.

(Testimony of Thomas Virden.)

Q. That is the question I am asking you. You are willing to confess it can't be operated as an economic unit?

A. I wouldn't want to, no. [487]

Q. At least you are ready to stand by that, as I understand you, you still think a unit of 1,523.5 acres at \$65 an acre is a fair comparison with 267 acres at \$55? A. Yes, I am.

Q. You would just as soon have one as the other at those prices? A. That's right.

Q. Mr. Virden, you have been appraising now for eight years for the Bureau of Reclamation?

A. Yes.

Q. And all these appraisals you have told us about, they were all made for one customer, were they not, the Bureau of Reclamation?

A. Yes, sir.

Q. Your entire appraisal experience, professional or whatever it might be called, has been for one customer alone?

A. Not all my experience, no.

Q. You spoke about appraising some dwellings, was it?

A. No. The question was asked if I had had experience with the Bureau of Reclamation in residential appraising, and I said no.

Q. You might tell us your prior experience in appraisals, where was that, and what kind of land?

A. My previous experience was when I was in or connected with the banking business, and I also did work for the [488] First National Bank of Omaha, in livestock—National Bank of Omaha, as

(Testimony of Thomas Virden.)

an appraiser and inspector for loans for that bank, and while many of those loans primarily were secured by livestock we often times made an appraisal of the property that was supporting this livestock.

Q. Then that was primarily livestock appraisal, was it not?

A. I wouldn't say that exactly because back in the early thirties, in times of distress, these loans became rather burdensome, and additional security was taken on land where it was available.

Q. That experience was additional to what you have had for the Bureau of Reclamation?

A. That and buying and selling and owning lands of my own.

Q. None of the lands were of this character, wheat lands, in your own case?

A. I wouldn't say there was any wheat land.

Q. And you haven't been buying or selling or owning wheat lands, have you?

A. No, I have not.

Q. The last eight years, at least, your professional activities as an appraiser have been entirely for the Bureau of Reclamation?

A. I have been employed by the Bureau of Reclamation full time for the past eight years. [489]

Q. Do they have certain methods and practices that they instruct your appraisers in, technique?

A. Not too specifically. Generally, we try to follow accepted appraisal methods.

Mr. Wiggenhorn: That is all.

Mr. Galles: That is all.

(Witness excused.)



(Jury admonished—10-minute recess.)

Mr. Galles: Henry Murray.

The Court: Just a minute, Mr. Meissner is back. If you want to use him now, I think this would be the proper time.

Mr. Wiggenhorn: I was going to inquire, your Honor. He has been up to see me and talked to me during the recess. He told me he has the tickets here. I haven't seen them yet, I haven't had a chance to check them.

Mr. Galles: Did you ask him for them?

The Court: Put him on the stand and get the tickets, they will be in court, then.

Mr. Wiggenhorn: It will take a little time after getting him on the stand to add them up. I don't want to make the same mistake in arithmetic Mr. McHale made.

The Court: Come forward, Mr. Meissner.

### JOE MEISSNER

recalled as a witness on behalf of plaintiff, having previously been [490] sworn, testified as follows:

### Examination

By the Court:

Q. Come up here and take the stand. Do you have the tickets that you have in your possession?

A. Yes.

Q. Do they just cover, do they just refer to the land of Mr. Kolstad, that you leased from him?

A. Yes, but they are not all there, though.

Q. Not all of them are here? A. No.

Q. Are all of them for any one year?

(Testimony of Joe Meissner.)

A. For 1952.

Q. All of the tickets for 1952 are here?

A. Yes.

Q. With some other tickets for various other years?

A. Yes, and there is also tickets in there that would be applied to land of Henry Kolstad that we farmed in that lease of Clarence Kolstad.

Q. Some of these tickets then cover land belonging to Henry Kolstad?           A. That's right.

Q. Can you distinguish the tickets here that refer to Henry Kolstad's land?

A. No, I could not.

Mr. Wiggenhorn: May I ask a question? [491]

The Court: Oh, yes, indeed, I was just going to have them marked so they will be in the Court's possession and you can examine them at another time.

Further Cross-Examination

By Mr. Wiggenhorn:

Q. Then, as I understand you, Mr. Meissner, neither you nor I nor the Court nor anybody else going through the tickets could segregate the tickets that represent wheat marketed from the three Kolstad places that are here before this jury, the Clarence Kolstad place, the Alta Kolstad place, and the place owned jointly by them? Do you understand my question?           A. Yes.

Q. What is your answer?

A. I would say no.

Q. You couldn't do that?           A. No.

(Testimony of Joe Meissner.)

Q. So, we don't have any authentic information from these tickets that would support the average per acre yield you have testified to, do we?

A. Not the acres you used.

Q. I am not using anybody else's acres, not Henry Kolstad's acres. Just because he has the same name, he is not to be confused with Clarence or Alta Kolstad, is he? [492]

A. Right.

Q. I don't want to leave you without having some explanation. Do you have any further explanation of how you arrived at those average yields? I want to give you an opportunity, every opportunity, if you can tell us.

A. When you farm a piece of land and you give a share off of it, you have at the end of the year a pretty good idea about what the crop yielded.

Q. You don't get it by just figuring it in your head, you have to have some authentic information or sales tickets to show just how many bushels you yielded from that place, don't you?

A. Yes, you have to have all the tickets and figure it up to get your one-quarter crop share.

Q. I call your attention also to the fact that quite a long time has gone by since 1952, and you are now testifying to an exact fact. Do you have anything further to say about that?

A. Well, I would say there could be a slight variation.

Q. Are you testifying from memory or are you testifying from records?

A. Well, it is more from memory.

(Testimony of Joe Meissner.)

Mr. Wiggenhorn: That is all. [493]

Redirect Examination

By Mr. Galles:

Q. Mr. Meissner, you computed the averages you testified to a couple years ago, you said. Was that in 1954, when Mr. Virden called on you?

A. Yes.

Q. What elevator tickets did you have available at that time for the Kolstad properties?

A. Well, we had those tickets, but we didn't refer to them.

Q. How did you arrive, then, at the average that you now testified to, and that you figured when Mr. Virden was there?

A. Three years we got that average out of the A.S.C. office in Chester.

Q. Which three years?

A. The last three years.

Q. Yes.

A. And the other two years, we just kind of figured an estimate on it.

Q. I see. You gave these figures on the stand to-day from your memory of what you calculated in 1954?

A. That's right.

Q. And you had it marked down in the meantime, and remembered it in that manner? [494]

A. Yes.

Q. And you think that there is a possibility of an error in your averages. Do you think it is low or high, or is that the best estimate you can give?

(Testimony of Joe Meissner.)

A. I would say for the average for the six year period, it would be pretty close, but it could vary one year to the other because there was a few years we held wheat over to the following year before we sold.

Q. But the average for all the time you farmed it which you gave at 16 and a half bushels, you think is a good estimate of what the land produced for you while you were farming it? A. Yes.

Mr. Galles: That is all.

#### Recross-Examination

By Mr. Wiggernhorn:

Q. Before, when I examined you, you mentioned the fact that in addition to the three Kolstad places we are trying here now, you had farmed 5,000 acres of your own, six brothers of you, that is true, isn't it? A. Yes.

Q. Now, it is disclosed that you had still another place you were farming for at least part of this six year period; that was the Henry Kolstad place, which has no relation to [495] these places at all?

A. Yes, we had this Clarence Kolstad place leased——

Q. I know that there is no significance to Henry Kolstad just because he has the same last name. It is just another place just as though his name was Jones, isn't it?

A. It didn't, but I guess I will have to explain it to you.

Q. Well, explain.



(Testimony of Joe Meissner.)

A. See, Henry Kolstad had some land in with the Clarence Kolstad place——

Q. Do you mean that he has some land in with Clarence Kolstad's land?

A. Adjoining, and they traded that particular land for some on the south side of the river, and we went ahead and farmed Henry Kolstad's land along with Clarence Kolstad's land, and it all went the same way, and I presume Clarence Kolstad settled with Henry Kolstad on the crop share money. We gave him one-fourth of it.

Q. I believe I understood you to say also that you got some, you think you got some of the records of the number of bushels that were harvested from the Clarence Kolstad and Alta Kolstad property, and their joint places, the three of them, from the A.S.C. office?

A. Yes.

Q. What is the A.S.C. office, by the way? [496]

A. Well, it was the Allotment Office in Liberty County, I guess.

Q. Well, they wouldn't know the number of bushels that were raised on the place except as you reported it to them, is that true? They are not present when you harvest your crop, no representative from that office?

A. No, they aren't.

Q. How do they get the records you spoke of you got there of the number of bushels you produced unless you gave them to them?

A. Either we would have had to give them to them, or Mr. Kolstad. I don't know which source they got them from; I couldn't say.

(Testimony of Joe Meissner.)

Q. But you think you found them there?

A. Yes, they have them there.

Q. You don't recall how many bushels their records showed for those three years you spoke of?

A. Well, it was supposed to be the same as I have on this paper here.

Q. You haven't referred to any paper up to this moment.

A. Well, let's see, the last three years it would be that I am referring to.

Q. Do you have some sort of a paper you are relying upon as a memorandum for your testimony here? [497]

A. Yes.

Q. I wonder if I could see that. Do you have it in your pocket?

(Witness produces document.)

Q. I notice it is typewritten; who did that for you?

A. Mr. Virden typed it over.

Q. Mr. Virden, the witness who just testified here a minute ago, he typed this up for you?

A. Yes, I have one here, I scribbled one myself.

Q. Where did he get the information we find on this typed sheet?

A. That was the information we got together.

Q. That is, you and Mr. Virden got together on it, you say?

A. That is the one we made up, yes, at that time.

Q. You don't mean to say he furnished some of the information that is here appearing, do you?

A. No.

(Testimony of Joe Meissner.)

Q. I notice you have for 1952 reported on this sheet, this memorandum of yours, 1,718 acres. Don't you know, as a matter of fact, that for 1952, the Allotment office showed 18 hundred and some acres under cultivation on these three Kolstad places we are concerned with here? I'll give you the exact amount, 1,854. A. 1,854?

Q. Yes, for 1952. [498]

A. I don't know where that error would come in it.

The Court: Tell me, Mr. Meissner, the figures you talk about that are in the A.S.C. office; did you get them there, or did somebody else get them there and give them to you?

A. Somebody else got them.

The Court: Who got them and gave them to you?

A. Mr. Virden.

The Court: Mr. Virden?

A. Yes.

Mr. Wiggenhorn: No further questions.

The Court: That is all, you may step down. I have marked them so that if necessary you could examine them, Mr. Wiggenhorn, but Mr. Meissner, when the case is finally disposed of, if you want these back again, let the United States Attorney know, and we will see to it you get them back.

(Witness excused.)

## HENRY MURRAY

called as a witness on behalf of plaintiff, being first duly sworn, testified as follows:

## Direct Examination

By Mr. Galles:

Q. Will you state your name and where you live?

A. Henry T. Murray. I reside in Missoula, Montana.

Q. What do you do, Mr. Murray? [499]

A. I am an appraiser.

Q. And how long have you been in that profession?

A. Well, a matter of 10 or 11 years, something like that, part time, that is, I have been gradually working into it over that period of time, with the extent of work varying from year to year, but the last couple years, it has been exclusively real estate appraisal.

Q. What has been your formal education?

A. Well, to start with my college training, after putting in 41 years of ranching, I sold out and went to Bozeman and got my Bachelor of Science in Animal Husbandry in 1939, and a Master of Science in Agricultural Economics in 1942.

Q. Have you had any other special training?

A. Yes, I have taken special work appraisal offered by the American Institute of Real Estate Appraisers cooperating with the University of California. I took work there, and I took similar work with the Institute cooperating with the University

(Testimony of Henry Murray.)

at Utah; and I have also taken the work offered by the Society of Farm Managers and Residential Appraisers put on in cooperation with the University of Nebraska.

Q. Have you had any farming experience yourself?

A. Yes, I put in all my adult years operating a livestock and grain farm in Central Montana, that is, 21 years.

Q. Where in Central Montana?

A. Judith Basin County. [500]

Q. You raised wheat on that farm?

A. Yes, wheat and livestock.

Q. Now, do you belong to any professional societies?

A. Yes, I am fully accredited by the American Institute of Real Estate Appraisers with the professional designation M.A.I. I am also fully accredited by the Society of Farm Managers and Residential Appraisers, with the designation of Accredited Rural Appraiser, A.R.A. is the designation.

Q. Your M.A.I. designation, that is the same organization Mr. Holbrook belongs to that testified in this case?      A. Yes.

Q. You heard him testify to the qualifications to become a member?

A. I fulfilled those requirements, yes.

Mr. Wiggenhorn: May I suggest that is not his testimony?

Mr. Galles: I am sorry. I understood——



(Testimony of Henry Murray.)

The Court: It is not a correct manner in which to examine a witness, in any event, so the objection is sustained and the answer is stricken and the jury admonished to disregard it. If you want to examine with reference to it, go ahead.

Q. What are the requirements to become a M.A.I.

A. As I recall off hand, a candidate must be 30 years of age, he must submit to a series of written examinations covering the appraisal field; he must submit three different formal appraisals covering different classes of property that [501] he had done himself, and have five years of experience before admission to the institute. Those are the major requirements. There are some others, I believe.

Q. And a man in the real estate business just doesn't become a member by making application, as Mr. Wiggenghorn put it?

A. No, that is for sure.

Q. Have you published any articles in the real estate appraisal field?

A. Yes, I have an article on farm and ranch appraisals that was published by the Appraisal Journal.

Q. That is the journal for what organization?

A. The professional quarterly for the American Institute of Real Estate Appraisers.

Q. How many appraisals have you made, or what part of the country have you covered in your appraisal work?

A. Well, I had an assignment covering about 160,000 acres for the Shoshone and Arapahoe Tribe

(Testimony of Henry Murray.)

in Central Wyoming, 300,000 acres of farm and ranch land in Central Oregon in 1952; again this year I done approximately 60 tracts in the State of Oregon; I represented the land owners in the appraisal of about 125 tracts in the irrigated section of North Dakota out from Williston in what would be on the Buford-Trenton and in the Lewis and Clark Projects in North Dakota. I finished, under the direction of counsel here for [502] the defendant, the appraisal of approximately 2,389,000 acres of Indian land in Northern Idaho. I have put in considerable time in South Dakota during the past year during which I appraised probably in excess of 200,000 acres of farm and ranch land in that state, in addition to the various assignments that I have had over the State of Montana. I do work for the Montana Highway Commission, and I work in all parts of the state on that.

Q. And this is your exclusive business now?

A. That's right.

Q. Real estate appraisal work? A. Yes.

Q. You made an appraisal of the Kolstad properties involved in this action, the three separate parcels, at the request of the United States Attorney's office, did you not? A. Yes, I did.

Q. And would you state what you did in making your appraisal?

A. I first visited the property in early May of 1955 and put in a few days then going over the property. I got aerial photos of it and gave it a pretty good examination. Some of you may recall a

(Testimony of Henry Murray.)

heavy snow storm about that time. That drove me off the job. During the time I was off, I used the aerial photographs I had to make an overlay setting out all of the topography of the area, and when I went back [503] on the job, which I believe I didn't get back until August on this particular assignment, I took that map I had made into the field so that I could check the topography as I had obtained it from the aerial photographs against the actual conditions in the field. I found there were many features that could be misinterpreted in reading the aerial photographs, so I, with the map almost in hand, I covered the tract pretty thoroughly and mapped in the features that weren't revealed in the aerial photographs.

Q. Now, that was what you did on the place?

A. Yes.

Q. Did you do other work?

A. Yes, I had the opportunity of checking upwards of 100 sales in the area, some of them while I was engaged in this particular assignment, many others while I was involved in a right-of-way problem in the area. The work was so interwoven that the sales that were made for one purpose, inspection was good for the other, so that way I had the opportunity of personally examining practically every tract that had been sold for a period of, oh, through the latter part of '52, '53 and '54, and the early months of '55, or the first half of the year 1955, and talking to either the buyer or the seller,

(Testimony of Henry Murray.)

and in some cases, both buyer and seller in each of those transactions.

Q. And did you consider all of these sales that you examined? [504]

A. Yes, they were all part of the composite picture that I used to familiarize myself with the area and what the market was doing.

Q. Now, since the date of taking in this action, May 24, 1955, did you consider any sales, investigate any sales since that time?

A. Yes, I have, I believe I have checked about everything that has transpired during that time up to the present, up until mid-December, I would say.

Q. You have given consideration to those sales as well as the previous ones? A. Yes.

Q. What else did you do, or did you do anything else in connection with your work on these tracts?

A. Yes, my research took me into the soil phases and also into the production of the area.

Q. And what did you find?

A. Well, I found that the vicinity of these three properties that are involved in here was primarily a winter wheat belt, in fact, about the only winter wheat area of Liberty and Toole Counties. The Agricultural Statistician of the United States Department of Agriculture, cooperating with the Commissioner of Agriculture of the state put out a book every two years or so in which they compile all of the average production according to counties and to use. The area of [505] winter wheat of Liberty County and Toole County almost coincides with the



(Testimony of Henry Murray.)

area that we have here, because I learned that this was primarily the winter wheat region of those two counties.

Q. You mean winter wheat is not raised in any other areas in the two counties?

A. Practically none. This is the area that was referred to there, and I think the figures given would apply very closely to this particular area.

Q. Well, now, did you make any maps in connection with your work on these parcels?

A. Yes, I have already said that I made maps and classified the land right on the ground, that is, by a personal inspection of what I, as an appraiser, and also backed by the number of years of practical farm experience that I had, determined was the highest and best use of that land.

Q. Do you have that map in court here?

A. Yes, I do.

Q. And do you think you could better explain your opinion by the use of such map?

A. Yes, I do.

The Court: I hope you make more use of this map than of the other three you got in.

Mr. Galles: I apologize for that. I am sure we will use this map. [506]

Q. Now, we have had the map you referred to marked as Plaintiff's Exhibit 31. Would you state how you prepared it?

A. This is the Clarence Kolstad property. It is made from tracing the aerial photographs, in which the physical features, Willow Creek here, Eagle



(Testimony of Henry Murray.)

Creek up through here, Marias River down through here (indicating), were all shown, also the highway that goes across the property known as the Old Bootlegger Trail, and the marks, which I call hashering, shows the breaks and the hills, and about the steepness of them are indicated by the density of the hashering. The green indicates—I have made only three classifications. The green is the crop land, the yellow is the tillable land, and the orange, if you choose to call it that, and the red is the grazing land. The greater part of the good land had primarily or previously been cropped, but in going over it for the highest and best use, I did find areas which I thought that I, as a farmer, or another typical farmer, would probably cultivate, and so I have delineated those areas here by the difference between the two colors on here. There is more tillable land along the river. I have shown no irrigated land because I could find no water rights. I didn't regard alfalfa as the most profitable use of the area, when a man is equipped to raise wheat on a large scale, and so I have shown anything that I felt was tillable in the yellow, and that—that is, in red is what I took as probably [507] not suited for cultivation. This doesn't show too great an irregularity of topography, yet it is quite rough and cut up, and I didn't put in any tillable land in there.

Q. You are referring to two rectangular portions at the top?

A. Sections 30 and 31, Township 30 north, Range 4 east.

(Testimony of Henry Murray.)

Q. Now, as you have stated, I believe, you prepared this map from the information that you gathered yourself? A. Yes, that's right.

Q. I notice there are what you might call overlays? A. That's right.

Q. Explain what they are, please?

A. This is the entire Clarence Kolstad tract before taking.

Q. That is, with both overlays on the paper map?

A. Yes. I might explain down here in Section 26, you will see this diagonal line. Twenty-six should be over here another mile or so. I didn't want to extend the map over there. This 160 acres which lays four forties in a row has 20 acres of land in crop, about another 60 is suitable for cultivation, and the breaks are grazing land. This is what remains of the tract after the taking (indicating).

Q. Now, just a minute, we have taken the top overlay and thrown it on the back, so you have just the one overlay? A. Yes, on the base map.

Q. Now, go ahead.

A. We have the tracts of cultivated land here. I might [508] start up here in Section 31 where there is the southeast quarter of the southeast quarter, it is severed. It is primarily tillable land with some little waste land in it. In the northwest quarter of section 8, there remains 120 acres in an irregular tract. That is somewhat difficult to cultivate in that shape; that land in Section 9 is fairly irregular; that in 17 and 18 is not in too bad a

(Testimony of Henry Murray.)

shape. This isolated land over here in 10, the tract isn't affected, the value, however, is. On the south side of the river in what would be the southeast quarter of the southeast quarter, section 20, the southwest quarter of the southwest quarter of section 21, there is an isolated 80 acres. I should have called your attention to it before on the other one. The part in section 20, I took it as 35 acres of tillable land before because there were other areas in here that could also be tillable, but leaving this much only after the taking, I didn't feel that any typical operator would farm what he had left, so I put it all back into grazing after the taking. There is a possibility that I miscalculated on that. It adjoins the reservoir and possibly has some potential value as boat sites or for boating, which I didn't consider in my appraisal.

Q. I have had marked three sheets of paper stapled together, marked Plaintiff's Exhibit 32, and I ask you if you can state what that is, please?

A. This is a summary that I have prepared showing the breakdown of values by the several approaches that I have used. Page 1 covers the C. A. Kolstad property, page 2, the Alta Kolstad property, and page 3 is the joint ownership of C. A. and Alta Kolstad.

Q. All right, now, with reference to the C. A. Kolstad property, do you have an opinion of the fair market value as of May 24, 1955, before the taking?

A. Yes, I do have.

Q. Would you state what that is?

(Testimony of Henry Murray.)

A. That is \$335,664.

Q. Is that your opinion of the fair market value?      A. By the summation approach.

Q. I want your final figure, if you would, please, what you think it is worth?

A. The summary that I have here, taking into consideration not only the summation approach, but the other approaches as well, and drawing my conclusions, \$290,000 before the taking.

Q. How did you arrive at that, Mr. Murray?

A. Well, I took the three accepted approaches to value and more or less folded them in together, weighed them out. To give you an example, I had 2397 acres of cultivated at \$100 an acre, 1231.77 acres of tillable at \$65 an acre, 1569.94 acres of grazing at \$10 an acre, and there was an old sheep shed and an old building which had some utility value as a [510] granary. They didn't represent much value, but I gave them a utility value of \$200. The total by the summation approach was \$335,664.

Q. Now, would you explain what the summation approach is so the jury can understand?

A. That is taking the various parts, breaking down a classification, taking the various parts at prices that are pretty well determined on the market for the various classes of land, taking the component parts of the land, taking them apart and putting a value on each.

Q. Why isn't that your opinion? I noticed your opinion is considerably less than that?

A. Well, I might say you buy your automobile



(Testimony of Henry Murray.)

as it is priced on the sales floor, and not through the parts department. We appraisers use the summation approach as the upper limit of value, that is, as a guide, as a check, but it generally represents the upper limit, just as with a car would, if you attempted to buy it by those various parts, you would find it would cost much more than the accepted market value, or accepted market price.

Q. You mentioned three approaches. Now, what is another?

A. Yes, my value as indicated by the earnings, that is, taking an average production of 20 bushels per acre, taking the part that can be attributed to the land, and capitalizing that out, I have a value of \$293,426. [511]

Q. Would you explain how that earnings approach works, how it worked in this case?

A. If I might get an example that I have already.

Q. Now, you are referring to some materials that you made yourself?

A. I have put it together, compiled it for the appraisal of this property. This is before the taking. I have a total of 2397 acres of cultivated land on this ownership. This is a summer fallowing country so we expect to have one-half of it in crop, 1198½ acres producing 20 bushels per acre, and that would be 1198.5 by 20 bushels, giving us 23,970 bushels total production. There is a little discrepancy in the share that is attributed to the land, and we usually take what custom dictates in the neighbor-



(Testimony of Henry Murray.)

hood. I found that this wheat land was generally leasing, sometimes on a quarter, sometimes on a third. I tried to find out which was which, and I thought that I could find where the better units, that is where there was considerable acreage of good land, the owner was in a position to get the higher share, so I figured that share of one-third to this land, 7,990 bushels.

Q. Why do you attribute only one-third to the land, what about the other two-thirds?

A. Well, theoretically, that is the cost of production, that is, if you would take the entire gross production and [512] deduct the farming operations, that is the cost of tillage, cost of seed, hired labor, everything that goes in, the various factors of production, you would come up with a certain figure, but in doing that, the more efficient operator would be pretty well selling his services along with his land, and we like to be impartial in this, and take what is most typical, and in that way, we iron out the difference between poor operators and highly efficient ones, and feel that by doing that, we are putting a value on the land and not evaluating the operator.

Q. Very well, would you proceed, then?

A. Well, on this tillable land—by tillable, I mean the land in orange on the map and that has not been previously broken, but is susceptible of cultivation, and taking that one-half in crop, 1231.77 acres, one-half in crop makes 615.83 acres, and I have figured that at an average production of 18 bushels. The

(Testimony of Henry Murray.)

reason for that is that I think the better land generally has been already placed in production, and the land that is left is not quite so good, and my experience would indicate that on those smaller tracts that it is not quite as easy to farm and there is more expense, and so I figured that at 18 bushels average, so we have 613.83 acres at 18 bushels which gives us 11,085 bushels. In this case, with these small irregular tracts, I have taken one-fourth as the landlord's share, making 2771 bushels. Now, we [513] have the production from the cultivated land, 7990, plus the 2771, equals 10761, which taken at a market price that I determined of \$2.25 per bushel, and that would include a premium for protein, making a gross return from the wheat production of \$24,010. Well, we have 1569.94 acres of grazing——

Mr. Wiggenghorn: What is that figure again, please?

A. 1569.94 acres of grazing, and that is quite widely scattered as you will see from the map. There is none of it could be considered a year around operation in my judgment. A greater return can be made by cropping that portion that is tillable and even regarding the rest as more or less waste land. However, when the crop is off on the fall, there might be a chance to use it, and I have given it a nominal return of 15 cents per acre, which is the basis on which Mr. Kolstad rented it previously, making \$235.49 return from the grazing, or a gross return to the land of \$24,245.49. I have estimated the taxes on that at \$771. There is no buildings to

(Testimony of Henry Murray.)

insure or maintain, so that we come down to the pure rental there, or the net imputable to the land, \$23,474.09, capitalized at eight per cent gives a value of \$293,426, by the earnings, capitalization of the earnings.

Q. That is the figure you have on Exhibit 32 as far as the C. A. Kolstad property is concerned?

A. Yes, that is right. [514]

Q. Now, the third method or approach you made is what?

A. Is the value as indicated by the market data.

Q. What is that?

A. You will notice above by the summation approach my average value per acre is \$64.56. The sales that I have examined in the area, considering the amount of tillable land, the amount of cultivated land, the amount of grazing land involved, I couldn't find where there was anything that would justify a higher figure of \$64.50, and my findings would indicate that I could substantiate \$55 as the market price according to other sales in the area, and that made approximately \$290,000. Anyway, it is rounded to \$290,000.

Q. Now, do you have an opinion of the fair market value of the C. A. Kolstad holdings as of May 24, 1955, after the taking?

A. Yes, I do. The fair market value in my opinion after the taking is \$63,000.

Q. And did you check that by the other approaches?

A. Yes, that is checked by the summation ap-

(Testimony of Henry Murray.)

proach. The land, the 837 acres of cultivated land remaining was reduced in value by \$15, the grazing—pardon me, the tillable land, 172 acres, was reduced to \$40, which is a reduction of \$25, the 391 acres of grazing remaining remains the same. It wasn't too desirable before, and I felt that it was not hurt to any appreciable extent after the taking, so it remains the same. [515]

Q. Then, the average price per acre on the remaining tract as you have determined it is what?

A. By the market approach, \$45.

Q. And what is the difference between the before valuation and the after valuation of the C. A. Kolstad property?

A. My value before, \$290,000, the value after, \$63,000 or a difference of \$227,000.

Q. Now, with reference to the Alta Kolstad property, did you prepare a similar map on that tract?

A. Yes, I did.

The Court: Are you going—you had better mark these overlays you are using separately.

The Witness: The base should be marked, I think, and then each overlay.

Q. You prepared this overlay, being Plaintiff's Exhibit 34, Mr. Murray? A. Yes, I did.

Q. In the same manner as you prepared Exhibit 32?

A. Yes, I used the one base with transparent overlays.

Q. And the classifications you have given, the three classifications, the colors are the same as in the previous? A. Yes, that's right.



(Testimony of Henry Murray.)

Q. What is green?

A. Green is cultivated, orange or yellow is the land that is susceptible of cultivation, called tillable land, and the [516] red is the grazing land.

Q. Very well.

A. I wanted to point out here, if I may, that the difference between the previous map and mine is the fact that these areas in here could not be determined with accuracy from the aerial photograph, and that is where I checked it in the field, and represents my opinion of the land that can be cultivated with fairly regular turns. Not every hip and so on that might be plowed is shown there, but the practical aspect of the shape of the farm for modern equipment.

Q. When you said the previous map, Mr. Holbrook, or Mr. Murray, you were referring to Exhibit No. 7?      A. 7.

Q. Yes, and in particular, as an example, would you show us what you mean by the shape of the field you have as tillable?

A. Well, for instance, in Section 20 of the Alta Kolstad property, I don't believe a typical farmer with modern day equipment would take these little narrow, slim places down there, I don't believe they would ever turn around the creek or irregularities here, assuming this is tillable land here that they would make a certain degree of uniformity along there, trying to make the field as regular as they could (indicating).



(Testimony of Henry Murray.)

Q. That is what you have done in your exhibit? [517]

A. That is what I have tried to do here, yes. The map that I am turning over now has represented the entire tract before taking.

Q. That is the first overlay on Exhibit No. 34?

A. Yes. The area that remains shows that where we did have some pretty good fields along here in Sections 33 and 29, there are just little parcels here. That raises the question as to their future use at all. This tract here in 31 has been completely isolated by the water backing up the Willow Creek. Over here to the extreme right hand side, which would be in Section 35, there is a forty on the east side of Eagle Creek which is grazing land. It was grazing land before. I have depreciated its value as grazing land, and yet, at the same time, I question whether it might not have an enhanced value as a boating site upon the development of the lake.

Q. All right, would you take the stand again, please? Now, do you have an opinion and a conclusion of the fair market value of the Alta Kolstad property as of May 24, 1955, before the taking in this action?

A. Yes, I do.

Q. State what that is?

A. That value is \$189,600.

Q. How did you arrive at that?

A. That is the folding in, as I have indicated before, of [518] the three approaches to value, finally coming up with a market value by the market approach and using the others as a check. I have

(Testimony of Henry Murray.)

under the summation approach, 1725 acres of cultivated land, and I don't regard this cultivated land as the equal of the Clarence Kolstad property, it isn't in the large fields, generally speaking, the soil is not quite equal to it, and I have shown a value of \$85 per acre. There is 136 acres of cultivated which is a later field to be broken out, and if I might point that out, this area in Section 33 on the section line between 33 and 32, and also the east half of the southwest quarter of Section 33 is a more recent breaking, it is an irregular field, somewhat hilly, and I have given that a little less value, \$65 an acre. I have 630.95 acres of tillable which is shown in the orange there at \$50 per acre; 2247.92 acres of grazing at \$10 an acre, and on this tract of land, there is what was referred to as the Sailor buildings which have been previously described here. I attributed a value of \$6,430 to the improvements on the property, making a total by the summation approach of \$215,973, or an average value of \$45 per acre. The earnings approach, the capitalization of earnings, as I have indicated before, I have gone through the process, that would show a value of \$154,353. That probably is quite a spread between the summation approach, but I will call your attention to the fact that there is a lot of land there in grazing land, all grazing, that is not [519] producing very heavily, so your earnings approach is down somewhat; and the market approach, where previously I had \$45 by the summation method, the market would indicate an overall average value for

(Testimony of Henry Murray.)

your grazing, your tillable and farm land of \$40 per acre, or a fair market value according to my estimate of \$189,600.

Q. And after the taking for the lands remaining, do you have an opinion of the fair market value as of May 24, 1955?

A. Yes, my estimate after the taking of the fair market value is \$100,000.

Q. Was there any reduction in value because of the taking that the remaining land suffered?

A. Yes, where previously I had had a value of \$85 on the cultivated land, the bulk of the remainder took a value of \$65, with the isolated tract in Section 31, which is severed by the water backing up in Willow Creek, I reduced that further to \$60. The tillable land is practically the same as it was before, and I left the value the same. The grazing I left the same, except the 40 acres to the extreme right in Section 35, which I reduced from \$10 to \$5, so that my valuation by the summation approach after the taking was \$114,819, or an average value of \$40 per acre. The value estimated by the earnings, capitalization of earnings was \$109,968. By the market data approach at an average value of \$35 per acre after the taking, the value was \$100,000. [520]

Q. And the difference between those?

A. So my summary, before \$189,600, after, \$100,000, the difference being \$89,600.

Q. Now, with reference to the joint property, Mr. Murray, do you have a similar exhibit that you prepared?

A. Yes.

(Testimony of Henry Murray.)

The Court: I wonder if I might ask a question about the summary you have on the Alta Kolstad property. You have "After taking" and you have a list of figures, and a sum of 2868.59 acres.

A. Yes.

The Court: In your list of figures, I don't understand——

A. That is a little bit confusing. You will notice I have shown 1154 as cultivated, but haven't extended any value per acre because there is a breakdown there of two different values, 799 acres of cultivated at \$65, and 355 acres of cultivated at \$60, which takes care of two classes of cultivated land, and the same thing applies to the——

The Court: Grazing?

A. ——grazing acres.

The Court: Very well, proceed.

Q. (By Mr. Galles): The exhibit has been marked as Plaintiff's Exhibit 35, and would you state what that is, Mr. Murray?

A. That is the map of the ownership, of the joint ownership [521] of C. A. and Alta Kolstad. The colors are the same as on the previous maps, this land along here, the bottom land along the Marias here being alfalfa fields, but getting no special consideration because of that. On a wheat operation, it is difficult to find that a couple hundred acres of non-irrigated alfalfa takes any particular significance, and I have classed that as tillable land, as I have the various bottoms along here. I realize that there are brush and trees on some of them, and yet the



(Testimony of Henry Murray.)

soil is particularly good, and I felt that by making the differential in the price between the cultivated land and the tillable land reflect the cost of clearing and cultivation that we could arrive at the price in that manner. The topography as indicated here in the overlays shows the breaks. By having the topography in, you see why there is this irregularity. For instance, these spots I am referring to are a couple of small buttes in Section 3, and one in the southwest quarter of the southwest quarter of 2. They are non-tillable, just rocky buttes, and they take up little area, but having it this way shows why they have been colored and taken out.

Q. This exhibit consists of two transparent overlays colored and is used in connection with the base map exhibit previously identified, is that right?

A. Yes. We are now looking at the remainder, which is on the two sides of the Marias River, separated by the reservoir, [522] leaving the greatest area of cultivated land on the south side of the river, which can be enlarged only by about 60 acres of tillable land. The major part of the land on the north side is rough grazing land. I believe there is a matter of 19.6 acres, as I recall, already cultivated on the north side, which are these two tracts in Section 2 and another tract in Section 7—Section 2, Township 30 North, Range 3 East, and Section 7, Township 30 North, Range 4 East. Again, I have not tried to get every square foot I could of tillable land, but considered it as I think a typical farmer or operator would from the size of the equipment,



(Testimony of Henry Murray.)

using the long sweeping curves here, and you will notice here in the Northwest quarter of 9 and the south half of the southwest quarter of 4 that I have indicated tillable land right across a gully or draw there because the slopes are not too precipitous, and it can be, I think cultivated.

Q. This exhibit was prepared from the same information that you prepared the other exhibits, gathered by you on the property itself?

A. That's right.

Q. Do you have an opinion of the fair market value as of May 24, 1955, of the jointly held property before the taking? A. Yes, I have.

Q. Will you state what that is, please? [523]

A. \$335,700.

Q. How did you arrive at that?

A. To give you the summation approach, 1,774 acres of cultivated at \$90. Again, this land is not as good as the Clarence Kolstad cultivated land. It is a lighter soil and somewhat inclined to blow, but it is in a pretty good sized regular shaped tract. 2,276.41 acres of tillable at \$65 per acre; 3,409.67 acres of grazing at \$10. There was quite an extensive set of improvements on this, which is the Turner place. On the bottom not far from what is known as the Turner Bridge, a large barn with quite a substantial addition to it. It had at one time, I assume, been a dairy barn, very well built, standing in good shape, a good hog house, a good poultry house, a usable granary, an oil house, I would say for fuel and oil, and an old bunk-house that had very little value. At another location which would be on the Section line between Sections

(Testimony of Henry Murray.)

15 and 22, there was an older set of buildings with a large sheep shed of "L" shape, an old house that was beyond repair, a couple of granaries, storage houses, and I didn't attribute a great deal of value to them, and yet I felt that they had some utility value, and my value for the improvements at these two sites on the property was \$15,610. My valuation by the summation approach, then, was \$357,333, or an average of 47.90 per acre. My value as indicated by the earnings approach was \$288,900, and the value as indicated by a market of \$45 per [524] acre average was \$335,700, and I accepted the market approach as the fair market value, or the value before the taking.

Q. And that is a higher value than the value indicated by earnings?           A. Yes.

Q. But lower than the value by your summation approach?

A. Yes, that's right. You see there is not a great deal of producing land on that, so the earnings is somewhat lower, the earnings approach.

Q. Now, after the taking, would you state what your opinion is of the value of the lands, market value of the lands remaining in the joint ownership as of May 24, 1955?

A. The value after the taking, \$156,600, making a difference of value for the taking of \$179,100.

Q. How did you arrive at your after-taking value?

A. The summation approach, 1,243 acres of cultivated on that tract—that is further broken down to 136 acres of cultivated that is north of the river, those three isolated tracts at \$65; 1,107 acres that I

(Testimony of Henry Murray.)

have on the south side at \$90; 984 acres of tillable at \$50; 1,687.17 acres of grazing at \$10, making a total by the summation approach of \$174,542, an average of \$44.59 per acre by that approach. My earnings approach indicated because there is a little bit more farm land here in proportion, \$175,803, and the [525] market data on an average value of \$40 per acre, \$156,600, so that was accepted as the fair market value after the taking, making a difference, as I have indicated of \$179,100.

The Court: What do you mean by market data?

A. That is the information of the sales that have been made in the area.

The Court: It is just information with respect to sales?

A. Yes.

The Court: In your opinion, is that what the market value is?

A. Yes.

The Court: And then it is your further opinion that the higher values of this land as viewed by the different approaches are not reflected by the market value?

A. Yes, the summation approach usually indicates a higher value.

The Court: I don't mean usually, I mean in this instance we are talking about. We are talking about this land located where it is. We are not talking about usual matters, we are talking about this land.

A. Yes, well, it happens——

The Court: Then I then ask you again, it is your

(Testimony of Henry Murray.)

opinion that the market value of this land doesn't reflect its higher value from other approaches?

A. That's right. [526]

The Court: And why?

A. Well, I think that can be explained as I have indicated before, that the total cost of a car assembled is not the same as if you would buy it through the parts department and assemble it. The summation approach is a check on value and would represent the upper limits.

The Court: Can you think of an example where the sum of the parts do reflect its true value?

A. No, I can't.

The Court: Go ahead, I am not going to take over the examination, I am just curious about this whole thing. We are getting to about that point where I suggested to the jury we are going to leave just a little early as we started a little early, so I think that maybe we had better do that now. (Jury admonished.) Court will stand in recess until Monday morning at 10 o'clock.

(Thereupon, a recess was taken until 10 o'clock a.m., Monday, January 21, 1957, at which time the following proceedings were had:)

Q. (By Mr. Galles): Mr. Murray, I noticed in your summary that your conclusion of the fair market value on the Clarence Kolstad tract, for example, is somewhat less than the figure you arrived at by what you call the summation approach. I



(Testimony of Henry Murray.)

wonder if you would explain why your conclusion is somewhat less than that figure? [527]

A. Yes. As an appraiser, we explore the value by three different approaches, and the summation is the component parts evaluated, and that is one approach. Sometimes, if there is an inactive market, it might be necessary to rely rather heavily upon that where there aren't a number of sales. Where the earnings approach can be as readily determined as it can on a wheat farming enterprise, we also use that approach, and we then take the three approaches and rely most heavily upon the market information as the amount that a willing seller and a willing buyer would come to.

Q. Now, you talk about market value, and that is what everybody is talking about here. What does determine market value?

A. It is what the willing seller and the willing buyer will negotiate at. The buyer may break down the prospective purchase as we have done here, so many acres of cultivated land, so many acres of tillable, so many of grazing, put an approximate value on the improvements, and that would represent his thinking. The seller probably would be some other place, but it is a basis of negotiation, and the market is not what we arrive at by this approach, but what we can conclude that the willing seller and willing buyer will finally consummate the deal at, as evidenced by sales in the market place. [528]

Q. What does a buyer, in your opinion and in your experience, take into consideration in arriving



(Testimony of Henry Murray.)

at what he is willing to pay for a given piece of property?

A. Well, among the things that are considered in addition to the location factor, are the soil types, and also the size and shape of the fields have a great deal to do with it. You will notice in the Clarence Kolstad tract that we are talking about now that his fields are larger, more regular in shape, and I have given that a higher value than I have, for instance, on the Alta Kolstad, where there are no regularly shaped fields, they are irregular, the cost of operation is more. Those things, again from an appraisal standpoint, and from my experience as a broker, are considered by the prospective buyer.

Mr. Galles: Your Honor, we offer in evidence the exhibits identified by this witness, being Plaintiff's Exhibits 31, 32, 33, 34 and 35. They constitute his summary sheets as well as the base map and the three overlays that were marked and identified.

Mr. Wiggenhorn: No objection.

The Court: Very well, they are admitted.

(Plaintiff's Exhibits 31, 32, 33, 34 and 35, being the summary sheets, map and overlays above referred to, were here received in evidence.)

Mr. Galles: You may examine. [529]

#### Cross-Examination

By Mr. Wiggenhorn:

Q. Mr. Murray, I may have missed it, but did you tell us when you first examined these lands, the three units?

(Testimony of Henry Murray.)

A. I believe I mentioned I was on the land early in May of 1955, and I think I recall that there was a snow storm that compelled me to leave the job at that time. I returned to complete this assignment in August of 1955, but in the meantime, I had been here on another assignment in the same area and was able to make a good many market checks at that time.

Q. And when were you first employed by the Bureau of Reclamation?

A. I never was employed by the Bureau of Reclamation.

Q. I am sorry, I withdraw that. When were you first employed by the Justice Department?

A. Probably in April. Anyway, it wasn't very long after I received the notice that I was on the job here.

Q. Of 1955?           A. 1955, yes.

Q. Now, you said that you could find no water rights with respect to any of these parcels. Where did you look for them?

A. I submitted that question to the United States Attorney, whether there was any involved; not being an attorney myself, [530] I have to rely upon legal counsel as to whether those things are to be considered, and I was advised by counsel that, as I understood it, there were no water rights. At least, that is the basis I proceeded upon.

Q. In other words, really what you were trying to ascertain was whether in your evaluation of these lands, you had to consider in addition to the lands themselves whether they were irrigated or not?

(Testimony of Henry Murray.)

A. That's right.

Q. But you didn't mean to say then you made a search of some sort to find out whether there were any water rights?

A. No, I didn't rely upon my own knowledge as to whether there were valid water rights.

Q. You do not pretend to say now, do you, that none of these defendants had any water rights?

A. I couldn't say that.

Q. It is merely a matter of whether or not you were to, in considering value, whether—

A. There was no evidence of irrigation at that time.

Q. Let me finish the question so you will have it all. I was asking you all you did was to be very sure that in valuing the property, you were not to consider it as irrigated land?

A. That's right.

Q. Now, in referring to Exhibit 32, which is your memorandum [531] tabulation of the methods by which you arrived at the values for each of these places, I notice at the very outset that you set forth in the first tabulation the number of acres of the different classifications, cultivated land, tillable acres, grazing acres, and so on, and after each one you have assigned a price on it. For instance, in the cultivated acres in the case of Clarence Kolstad you have \$100. I suppose that is \$100 per acre?

A. That's right.

Q. How did you arrive at that figure of \$100?

A. By two methods. One of them is a comparison of what cultivated lands were selling for in the area.

(Testimony of Henry Murray.)

I could find nothing that would exceed \$100 per acre; and another is to take a single acre of land—I might say that there are many sales made in that area of cultivated land at lower prices. In fact, there seemed to be two groups of sales, that is, they might be 40 to 60 dollars an acre, and there is another group that is higher, up to \$100. To satisfy myself from the earnings as to which group I could place more reliability on, I capitalized the earnings from a single acre, such as the 20 bushels I mentioned at \$2.25 a bushel, and taking the landlord's share as the amount imputable to the land, and that indicated to me that the earnings would approximate the upper brackets, that is, those sales in the \$100 or less bracket, more closely than it would [532] the group in the 40, 50 or 60 dollar bracket; so I took the market and then checked by the capitalization of income or earnings.

Q. That is another way of saying, is it not, Mr. Murray, that in arriving at the figure for cultivated land, you first of all took the market approach and then tested it by the income or capitalization approach?

A. Yes, that is for the component parts.

Mr. Wiggenhorn: No further cross-examination.

Mr. Galles: That is all.

(Witness excused.)

Mr. Galles: The government rests, your Honor.

The Court: Any rebuttal?

Mr. Wiggenhorn: We have no rebuttal.

The Court: Well, I think, probably what we had

better do, the Court has to have a conference with counsel, it might be better to recess until one o'clock and then we can have the arguments and instructions of the Court. (Jury admonished.)

(Thereupon, a recess was taken until 1:00 o'clock p.m. of said day, January 21, 1957, at which time Mr. Wiggernhorn opened the arguments to the jury on behalf of defendants, Mr. O'Connell and Mr. Galles argued the case on behalf of plaintiff, and Mr. Wiggernhorn closed the arguments on behalf of defendant, following which a 10 minute recess was taken, and then the following proceedings were had:) [533]

Mr. Schiltz: Defendants offer Defendants' Exhibits 36 and 37, being a summation or summary of the figures of Mr. Holbrook and Mr. Carrothers, respectively.

The Court: Any objection?

Mr. Galles: No objection.

The Court: Very well, they are admitted.

(Defendants' Exhibits 36 and 37, being the summaries above referred to, were here received in evidence.)

## INSTRUCTIONS TO THE JURY

The Court: Ladies and gentlemen of the jury, as from your previous experience now, you know this is the time when the Court instructs you as to the law of the case, you having heard the evidence in the case and the arguments of counsel. As you no doubt understand, you are instructed that the argu-



ment of counsel doesn't constitute any evidence in the case. I think counsel themselves explained that to you that their purpose, by their arguments and statements, is to assist you in analyzing the evidence that has been presented to you so that you can, under the evidence and the law, as I give it to you, arrive at a just verdict. These cases, for what we have here is in truth three separate cases, are what are known as condemnation cases. Under the Constitution of the United States, the Government is entitled to, for a public use, take the land of private owners, but the Constitution also provides that when the Government does that, it must pay the owner just compensation. [534]

Now, in this case, the land was taken by the Government, on May 24, 1955, and it has already been determined that it was taken by the Government for a public use, so we are not concerned with that in the case, but we are concerned with the question of what the landowner is to receive as a result of the taking of the land by the Government. In other words, we have to determine what is just compensation to each of the owners here involved in each of the three cases, that is, we have the case of Clarence Kolstad with reference to his land, and we have the case of Alta Kolstad, with reference to her land, and then we have the case of the lands of Clarence and Alta, which are owned jointly by them. You will consider each of those cases separately, and arrive at your verdict as to each of them separately. As I say, you are instructed that, under its power of eminent domain, the plaintiff in this case, that is the United

States of America, has taken the respective parcels of lands of the defendants, Clarence A. Kolstad and Alta A. Kolstad, comprising three separate parcels, as follows: 3,798.71 acres taken from Clarence A. Kolstad; 1,871.28 acres taken from Alta A. Kolstad; and 3,570.06 acres taken from Clarence A. Kolstad and Alta A. Kolstad, jointly. Said lands were taken from the defendants on May 24, 1955, and it is your duty in this case to determine from the evidence the just compensation to be paid to each of said defendants, because of the taking of his [535] or her property.

Now, just compensation means the payment of such a sum of money to the defendants as will make them whole, so that upon receipt by them of the compensation, they will not be any poorer or richer by reason of their property having been taken, and so that they will be in as good a position in money equivalent, moneywise, at the time of taking, as they would have occupied if their property had not been taken. Just compensation means the fair market value of the land at the date of taking. This does not mean the price which the property will sell for under special or extraordinary circumstances, such as a forced sale, but such price as would be reasonably arrived at in dealings between a willing seller and a willing buyer, where the seller was under no compulsion to sell, and the buyer was under no compulsion to buy. You should consider all of those matters and things, which a prudent and reasonable buyer and seller would naturally consider, discuss and take into consideration in the event of a sale of property.

You are charged, that if you find at the time of the taking, there was a free and open market for the sale of real estate, such as the Government has taken in these proceedings, then each of the defendants, as a landowner, is entitled to recover the fair market value of his lands at such time, notwithstanding that such fair market value might have been higher at the time of taking, [536] than at any other time prior thereto. The Government chose to take this land in May, on May 24, 1955, and so it must be held to the market value as of that time. The fact that you may find the prices at that time were higher as compared with other times prior to the taking, should not deter you from fixing the fair market value in your verdict as of that precise time, and if you find, with respect to any one of the defendants, that the land taken was a part of a larger tract, then you must determine whether, by the taking of said lands, the remaining lands of said defendant were damaged or depreciated in value. In such case, the compensation to which each defendant is entitled to is the difference between the fair market value of the entire tract before the taking, and the fair market value of the part of the tract remaining after the taking, and you should so determine the compensation to which each defendant is entitled in your verdict. Every fact concerning the property which a buyer and seller would be disposed to consider, should be given consideration by you in arriving at your verdict, including the size, and location, and terrain of the property, of the land, production, net earnings, and every other item that you find a buyer and seller

would consider in arriving at a determination of a purchase price.

Now, those are the considerations which you have to devote your attention to. You have to determine what just [537] compensation is in each of these cases, and that is determined by what the market value of the lands were on the date of taking, and so you take each case separately; take the value of the whole tract, each separate tract, determine the market value, the fair market value of that whole tract at the time of taking, and then consider the fair market value of the remaining portion after the taking, and the difference between the before taking value and the after taking value, is what the law considers to be just compensation, and when you arrive at that figure, then you have arrived at a verdict with reference to that land, and that owner. As I say, those are the considerations which you have to devote your attention to, and deciding these matters, and in viewing them, you are advised that as jurors you are the sole judges of the credibility of the witnesses, and the weight their testimony deserves. Now a witness, in the first place, is presumed to speak the truth, but this presumption of speaking the truth may be outweighed by the manner in which a witness testifies, or by the character of the testimony that he gives, or by contradictory evidence and testimony. You should carefully scrutinize the testimony given, the circumstances under which each witness testifies, and every matter in evidence, which tends to indicate, whether or not a witness is worthy of your belief. Consider each witness' intelligence,



his motive, his state of mind, [538] his manner and demeanor while on the stand; consider also any relationship that each witness may bear to either side of the case; the manner in which each witness may be affected by the verdict, and the extent to which, if any at all, each witness is either supported or contradicted by other evidence in the case. Now, of course, the inconsistencies and discrepancies in the testimony of witnesses, or between the testimony of different witnesses, may or may not cause you, as the jury, to discredit such testimony. In weighing the effect of discrepancies, consider whether they pertain to matters of importance or unimportant details, and whether the discrepancies result from innocent error or wilful falsehood. If you find, with reference to any witness, that the presumption of truthfulness is outweighed, you will give the testimony of that witness just such credibility, if any, as you may think it deserves. As I told you before, the argument of counsel is not testimony in the case. It is designed, and its purpose is, to assist the jury in analyzing the evidence in the case as presented to you in the light of the instructions of the Court as to the law. So the purpose is to help you, and you should give the arguments of counsel no consideration as evidence in the case at all, but merely use it as it may assist you in analyzing the evidence and weighing it, and arriving at your verdict under these instructions of the Court. The evidence in the [539] case consists of the sworn testimony of witnesses, and the exhibits which have been received in evidence, and all other facts which may have been



admitted. Any evidence to which an objection was sustained by the Court, or any evidence ordered stricken by the Court must be entirely disregarded by you. You are to consider only the evidence in the case, but in your consideration of the evidence, you are not limited to the bald statement of the witnesses, but on the contrary, you are permitted to draw from facts, which you find to have been proved, such inferences as seem justified in the light of your experience. Such an inference is a deduction or conclusion which the reason of the jury, and common sense, lead the jury to draw from facts that have been proven.

Now, you are further instructed that you are not bound to decide any issue of fact in accordance with the testimony of any number of witnesses, which does not produce conviction in your mind, as against the testimony of a lesser number of witnesses, or other evidence, which does produce conviction in your mind. So you see, the testimony is not judged by which side brings the greater number of witnesses, or presents the greater quantity of evidence, but which witnesses and which evidence appeals to your minds as being most accurate and otherwise trustworthy as weighed in the light of these instructions.

Now, as evidence of fair market value, there was presented [540] in this case, by both the Government and the landowners, two kinds of testimony. First, there was the testimony of expert witnesses as to their opinion of the market value of the land. Now, while the rules of evidence do not ordinarily permit

a witness to testify as to his opinion, an exception is made in the case of experts, who, by reason of training, education and experience, are able to give a considered judgment as to the existence of a fact. It is for you to determine what, if any weight to give the testimony of any such expert who has testified here, and you may reject the testimony of an expert, if you conclude that the reasons given by him in support of his opinion are not sound. In this connection, there was testimony of each of the experts relating to sales in the general market area of the lands taken. This was admitted as a part of the basis and reason upon which the experts base their opinion. I instruct you, as I instructed you during the trial, you are to consider that testimony only for that purpose.

Now, in addition to the testimony of the experts as such, there was also admitted direct testimony and evidence of particular sales. I believe, as I recall it, in these cases one sale was offered by the Government, and one sale by the landowners. These sales may be considered by you as independent proof of the fair market value of the land here involved, if you find, from a preponderance of [541] the evidence, that such sales, or any of them, were of lands comparable to the lands here involved. It is for you to determine whether the sales are comparable, and whether they do establish a fair market value as of the date of taking here, which is May 24, 1955.

You are further instructed, that in determining the fair market value of lands here involved, you are not limited to a consideration of the uses to

which the landowner put his land, but on the contrary, the landowner is entitled to just compensation based on the fair market value of the land, considered in the light of the highest and best use to which the land was, or might reasonably be put, in the reasonably near future, to the date of taking, which was May 24, 1955.

Now, during the trial, the question was asked Mr. Kolstad whether he had a water right, to which he answered that he did not. In this connection, you are instructed that there is no evidence that he had an adjudicated water right, but you are further instructed that every landowner has a right to the use of water of a stream or river, not otherwise being used by one with a prior right.

During the course of the trial, I occasionally asked witnesses some questions. I did that in order to bring out facts, which I thought then not fully covered in the testimony. You are instructed, that you are not to assume that I hold any opinion on the matters to which my questions related. [542] Remember at all times that you are the jurors, and as the jurors, you are at liberty to disregard all comment of the Court in arriving at your findings as to the facts here. You are just bound to follow the Court's instructions as to the law. The law does permit a Federal Judge to comment to the jury on the evidence, and to make such comment as, for example, the lawyers make in their arguments of the case, but even though the law permits that, if the Court did make comments, the comments of the Court would be directed just to the same purpose

that the argument of counsel is, that is, it would merely be to assist you, and you would not be bound by anything the Court said in its comments, but further, and over, and above all that, I have no desire to influence you in any way in arriving at your decision and your verdict in these cases.

The cases are not complicated. There are, of course, a mass of figures that have been submitted to you, but we have obviated any difficulty in that connection by submitting to you, and you can take to your jury room with you, the summaries of those figures so you will have the testimony of each of those expert witnesses and the testimony of Mr. Kolstad, the landowner, with reference to all of those figures, and so the matter is not going to be complicated for you so far as those things are concerned, and so I can see no necessity for me to comment to you on the evidence. [543] The issues are clear. It is a simple issue, just compensation. How is just compensation determined? By the fair market value of the lands before the taking, and taking the fair market value after the taking, subtract the difference and there is your answer. That is a simple problem for the jury, and so there is nothing for me to help you with so far as I can see. In any event, from anything that I have said, or any questions that I may have asked, or any rulings that I may have made in the course of the trial, don't, in arriving at your decision, give any consideration to what you may think my opinion is in the matter. If my opinion were of any real value, I would be trying the case without you as jurors, but you are the



jurors and the judges of the facts, and that is your responsibility, and you have to exercise it. As I say, you have the power here, a great power, but with that power goes a deep responsibility, and I don't want to interfere with the exercise of your duties in connection with those responsibilities.

I might say to you, that the lands involved here are apparently of considerable size, and from the figures involved, the just compensation, whatever it may be, is a considerable amount. You are not to consider, however, that the landowner is going to receive a large sum of money, and that the amount that does constitute just compensation is a large sum, because he, as the landowner, and she, as [544] the landowner, and both of them together jointly, are entitled to that. It is their land, and be it large or small, they are entitled to it. On the other hand, both parties, the Government and the landowners, come before this Court, and before you as Officers of the Court, as equals, and you will only arrive at a just verdict if you arrive at a true verdict. If, by any chance, you should consider that the landowner is getting a lot of money, you would not be fair to him. On the other hand, if you should consider that it is costing the Government a lot of money, you would not be fair to him or to the Government, and so, arrive at your verdict from the evidence in the case, and without regard to the consequences of it.

Now, your verdict must represent the considered judgment of each juror in order to return a verdict. That is, each juror must agree to the verdict. In other words, your verdict must be unanimous, and it



is your duty, as jurors, to consult with one another, and to deliberate with a view of reaching an agreement, if you can do so without violence to your own individual judgment. You see, each of you must decide the case for yourself, but do that only after an impartial consideration of all of the evidence with your fellow jurors, and in the course of your deliberations, don't hesitate to re-examine your own views and change your opinion, if your honest conviction, as to the weight of evidence, is [545] changed and you find that your original stand was erroneous, but do not surrender your honest conviction as to the weight or effect of evidence solely because of the opinion of your fellow jurors, or for the mere purpose of returning a verdict. As I say, the verdict must be yours, each of yours, each one of you must arrive at the verdict, and in that connection, you are instructed that you are not permitted to return a verdict which is known as a quotient verdict. In other words, after you get into the jury room, if there are any differences between you as to what the verdict should be, don't decide just to add up all of those and divide by the number of jurors, and return that as your verdict, or don't take the list of all of the expert witnesses and just add them all up and divide it by a number, and return that as your verdict. That kind of a verdict would be what is known as a quotient verdict, and it would be an illegal verdict, and would not be a proper verdict. As I pointed out to you, the verdict must be the judgment of each of you arrived at as a result of your

deliberations and viewing all of the evidence under these instructions.

When you go into the jury room, you will select one of your number to act as foreman, and the foreman will preside over your sessions and your deliberations, and he will be your spokesman in court. If it is necessary for you, in the course of your deliberations, to ask the Court any [546] questions, just notify me through the Bailiff that you want to ask me a question, and we will come up into court and you can ask me the question, and I will answer it if it is a proper question to be answered. In that connection, I may say to you, if you have any questions with reference just to the evidence itself, there is no sense in asking me any questions, because you are the judges of the facts, and I can't tell you what the facts are, and I don't pretend to.

There will be submitted to you all of the exhibits, which you will take to your jury room with you, and do you have the forms of verdict, or do I have them? You will take with you to your jury room three forms of verdict, one for each of the cases here. One of the verdicts, eliminating the title of the Court and cause is: "We, the jury, duly impaneled and sworn in this cause, hereby award the defendant, Alta A. Kolstad, as just compensation in this cause, the sum of blank," and then a place to write in the figure, and then a place to write in the numbers for the taking of her land, and then a place for the foreman to sign his name, and the same form of verdict is submitted to you with reference to

Clarence A. Kolstad, and with reference to the joint lands of Clarence A. and Alta A. Kolstad.

When you arrive at a verdict in these cases, and each of them, the foreman will then sign the verdict, and you will then return into court with them. [547]

Remember at all times in your deliberations in the court, you are not partisans in the case. You are judges of the facts, you are Officers of the Court, and your sole interest is the ascertainment of the truth, the determination of a fair and impartial verdict, and I am sure that you will discharge those duties in the light of your oath, and make a worthwhile contribution to the administration of our system of doing justice through the Courts by arriving at an impartial verdict here. Are there any objections to the instructions of the Court?

Mr. Galles: No objection.

Mr. Schiltz: No objection.

The Court: Very well, the Bailiffs have been sworn, and you will retire to the jury room and commence your deliberations, select your foreman, and commence your deliberations. Court will stand in recess awaiting your return. [548]

### Certificate

In the United States District Court, District of  
Montana, Havre Division

I, John J. Parker, certify that I am the Official Court Reporter of the above-entitled Court, and that as such I attended the trial of Cause No. 1726, United States vs. 11,211.45 acres of land, Clarence

A. Kolstad, et al., tried before the Hon. W. D. Murray, United States District Judge for the District of Montana, sitting with a jury at Havre, Montana, commencing on the 12th day of December, 1956, and reported in shorthand all of the proceedings had at said trial; that I thereafter transcribed said shorthand and prepared the foregoing transcript, which is a full, true and correct transcript of the proceedings had at said trial.

Dated at Butte, Montana, this 10th day of June, 1957.

/s/ JOHN J. PARKER,  
Official Court Reporter.

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[Title of District Court and Cause.]

### CERTIFICATE OF CLERK

United States of America,  
District of Montana—ss.

I, Dean O. Wood, Clerk of the United States District Court in and for the District of Montana, do hereby certify that the papers hereto annexed, to wit: Complaint; Order for Delivery of Possession; Notice of Condemnation; Appearance by Defendant; Deficiency Judgment; Notice of Appeal filed March 7, 1957; Final Judgment in Condemnation filed March 8, 1957; Notice of Appeal filed April 19, 1957; Notice of Appeal filed April 22, 1957; Motion to Set Aside Judgment; Order entered December 6, 1957; Notice of Appeal filed January 2, 1958; Designation of Contents of Record, filed January 7, 1958,

and Counter-Designation of Contents of Record on Appeal, are the originals filed in Case No. 1726, United States of America vs. 11,211.45 acres of land, more or less, in the Counties of Liberty and Toole, State of Montana; Clarence A. Kolstad, et al., and Unknown Owners, and designated by the parties as the record on appeal herein.

I further certify that the Transcript of Testimony in three volumes, and Defendants' Exhibits Nos. 2 through 20, inclusive, and 36 and 37, and Plaintiff's Exhibits Nos. 21 through 35, inclusive, are the original Reporter's Transcript of testimony, and the original exhibits introduced in evidence at the trial of this cause and are part of the record on appeal herein.

Witness my hand and the seal of said court this 18th day of January, 1958.

[Seal]      /s/ DEAN O. WOOD,  
Clerk as Aforesaid.

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[Title of District Court and Cause.]

United States of America,  
District of Montana—ss.

### CERTIFICATE OF CLERK

I, Dean O. Wood, Clerk of the United States District Court for the District of Montana, do hereby certify that the papers hereto annexed, to wit:

Affidavit, filed Nov. 4, 1957;



Exhibits attached to Affidavit;

Amended Counter-Designation of Contents of  
Record on Appeal, filed Jan. 29, 1958;

are the originals filed in Case No. 1726, United  
States of America vs. 11,211.45 acres of land, more  
or less, in the Counties of Liberty and Toole, State  
of Montana, et al., and designated by the Appellee  
for inclusion in the record on appeal in said cause.

I further certify that the following documents or  
papers, to wit:

Final Judgment entered March 8, 1957;

Motion to Set Aside Judgment filed November  
4, 1957;

Order entered December 6, 1957;

Notice of Appeal filed March 7, 1957;

Notice of Appeal filed April 19, 1957;

Notice of Appeal filed April 22, 1957;

named in the Amended Counter-Designation of Con-  
tents of Record on Appeal (annexed to this certifi-  
cate) were transmitted as part of the Record on  
Appeal to the United States Court of Appeals for  
the Ninth Circuit in the above-entitled cause, on  
January 18, 1958.

Witness my hand and the seal of said Court this  
29th day of January, A.D. 1958.

[Seal]

DEAN O. WOOD,

Clerk as Aforesaid;

By /s/ C. G. KEGEL,

Deputy Clerk.

[Title of District Court and Cause.]

United States of America,  
District of Montana—ss.

### CERTIFICATE OF CLERK

I, Dean O. Wood, Clerk of the United States District Court for the District of Montana, do hereby certify that the papers hereto annexed to wit:

Two Statements of Points on Appeal, filed February 3, 1958;

Resistance to Motion to Set Aside Judgment, filed November 18, 1957;

Transcript of Hearing on Motion for a New Trial, filed February 3, 1958;

Designation of Contents of Record on Appeal, filed February 3, 1958;

Amended Designation of Contents of Record on Appeal, filed February 5, 1958,

are the originals filed in Case No. 1726, United States of America vs. 11,211.45 acres of land, more or less, in the Counties of Liberty and Toole, State of Montana, et al., and designated by the Appellee for inclusion in the record on appeal in said cause.

I further certify that the following documents or papers, to wit:

Motion to Set Aside the Judgment,  
Affidavit in Support of Motion to Set Aside the Judgment,

Order of Court dated December 5, 1957,  
were named in the Designation annexed to this

certificate, and were transmitted as part of the Record on Appeal to the United States Court of Appeals for the Ninth Circuit in the above-entitled cause on January 18th, 1958.

Witness my hand and the seal of said Court this 7th day of February, A.D. 1958.

[Seal]

DEAN O. WOOD,

Clerk as Aforesaid;

By /s/ ELIZABETH C. McKEE,

Deputy Clerk.

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[Endorsed]: No. 15871. United States Court of Appeals for the Ninth Circuit. Clarence A. Kolstad and Alta A. Kolstad, Appellants, vs. United States of America, Appellee. Transcript of Record. Appeal from the United States District Court for the District of Montana.

Filed January 22, 1958.

Docketed: February 3, 1958.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the Ninth Circuit.

